

Department of Veterans Affairs

TRANSCRIPT OF HEARING  
BEFORE  
BOARD OF VETERANS' APPEALS  
WASHINGTON, D.C. 20420

IN THE APPEAL OF : Graham, Gordon

[REDACTED]

DATE : July 12, 2023

REPRESENTED BY : Pro se

MEMBER OF BOARD : Laura Cryan, Judge

WITNESSES : Gordon Graham, Appellant  
[REDACTED] Witness

JUDGE: Okay, good afternoon. This is Judge Laura Cryan presiding over a Central Office Hearing today, Wednesday, July the 12<sup>th</sup>, 2023. Present in the hearing room is the Veteran Mr. Gordon Graham. And the last name is G-r-a-h-a-m, Claim No. [REDACTED]. He is also an accredited representative with VA, and so his name is also going in the representative slot here today.

In addition, he has brought with him a witness who will you be testifying or are you just observing today, sir?

VETERAN: He will be testifying on behalf of his father. His father couldn't make it here. He's too severely disabled. He drove up from Georgia to take his place.

JUDGE: Okay. So his name is [REDACTED]  
[REDACTED]

Okay so, with that, if you would both please remain seated and raise your right hand I will administer the oath.

(OATH ADMINISTERED)

JUDGE: And, as we discussed before going on the record, the issue in this case is continuation of independent living services benefits to include a larger greenhouse. And so I'm going to tell you what I believe is going on here and then you can either correct me or we can go from there.

So, as you both the Veteran and the representative, you have a service-connected disability of hepatitis C that's been rated at 100% since 1994. And you, at some point, were granted vocational rehabilitation benefits. And in order to be entitled to independent living services you have to be so severely disabled that you -- you are so limited in the severity of your disability that your employment is just not feasible. And so once you are approved for independent living

services those services are provided based on your need and as well as what VA finds is your need based on counseling and -- and what the Veteran's voc rehab officer believes is to get you to maximum independent living.

So at some point the Board granted the services in terms of building a greenhouse and there -- afterwards there was to be a meeting to discuss the proposal and for some reason you weren't at that meeting. I don't know why you weren't there, but because you weren't there the -- the counselors and the voc rehab person decided on the size of the greenhouse and then you filed an NOD and have indicated that you don't think that your services should be terminated and that you are, in fact, entitled to a larger greenhouse. And that is where -- how we got here today.

So before we talk about the greenhouse, I'm a little confused because I don't understand how if you are -- if you are completely incapable of working how that you are -- got these benefits in the first place. I don't know if -- you know in my mind if you are representing Veterans and you are able to get on a plane and fly here from Washington and -- I don't understand why you would be entitled to the independent living services in the first place.

VETERAN: May I approach the bench, Your Honor?

JUDGE: You don't need to approach the bench. You can talk without --

VETERAN: I can't -- yeah I can't hear you.

JUDGE: Okay, that you can -- you can submit that --

VETERAN: Well I understand that, Your Honor. I don't mean to interrupt you, but it gives you a little bit of a historical perspective if you want to hear while I am talking why we are here today. Why --

JUDGE: Okay. So you can submit that into the record and I would be happy to look at it, but today this is about your testimony. So --

VETERAN: Okay.

JUDGE: -- I don't want to waste time looking at something that I can look at later.

VETERAN: Correct. The reason -- yes I probably appear very healthy. I have something called fibromyalgia in 12 out of 16 of my joints. I have a disease it's called Nehmer -- it's part of the Nehmer class disease. It's called porphyria cutanea tarda.

JUDGE: Right.

VETERAN: I'm rated 100% for that.

JUDGE: I think you're rated 100% for the hepatitis C.

VETERAN: I am for that, too. I have two 100% ratings.

JUDGE: Okay. So --

VETERAN: I was at the 40% for fibromyalgia, 30% for porphyria scaring.

JUDGE: And the 100% --

VETERAN: And the 10% for tinnitus.

JUDGE: Okay, yes.

VETERAN: And 30% now for hypothyroidism.

JUDGE: Okay.

VETERAN: Yes I am able now -- I spent a year in a hospital. I went through five -- four operations in Seattle Regional Hospital. They didn't think I was going to make it. When I came out I was hopelessly addicted to something called Dilaudid drug. I weaned myself off of that and in the process I met his father who had just been -- he has a 100% rating for PTSD, just been granted a greenhouse.

The whole purpose of the independent living program isn't predicated so much on your ability to accomplish something or your inability to accomplish something, it's to help you maximum your independence in everyday living, Your Honor. And that means to occupy yourself with something, some hobby that you enjoy doing. When I started out in 2011 to apply for this, I was -- had lost my ability to build houses. I was a general contractor and a framer. When I finally got out of the hospital I was an addict and I had -- I have pictures that I printed up for you. That's why I wanted to hand them to you because it explains the quality of my disability. I still -- I have six ventral hernias in my stomach which are not service connected. I never even bothered to file for it because I'm 100%.

JUDGE: And I understand that during that period of time if you were addicted to opioids that certainly you would be entitled to the -- you would have basic eligibility to be in the voc rehab program, and if voc rehab at that time determined that employment was not feasible then that would you know -- and you had a serious handicap -- employment handicap, then I can see where you would be entitled to these benefits during that time.

VETERAN: Um-hum.

JUDGE: But I am not seeing how you are still entitled to the benefits based on your standard of

living. I mean this isn't -- this isn't a program to maximize --

VETERAN: It's not --

JUDGE: -- to maximize independent living if you are already independently living.

VETERAN: Well I'm not independently living, Your Honor. I'm dependent to a great extent on others for -- to help me do my gardening. The process of using a greenhouse allows me to enjoy the outdoors which is impossible for me the moment it gets below about 40 degrees because of my cryoglobulinemia which I am rated for. It's part of the fibromyalgia rating. The porphyria cutanea tarda makes my skin photosensitive. I develop large bellous pemphigoids, like huge zits on my hands, my nose, my exposed portions of my face. Basically I can't be out in the sun, especially during the summer. And I enjoy gardening. I was -- it was my whole life after hours before I lost my ability to work. In the wintertime I cannot go out if it's below 40 degrees because all the blood it's called gamma globulins congeals in my extremities. When I come back inside they hurt for hours on end. They ache in fact. It's called Sjogren's syndrome I believe. They didn't rate me for that. They just rated me for the cryoglobulinemia and the analogous to with fibromyalgia.

The majority of my work is pro bono, Your Honor. I don't -- I advocate for people for this benefit, the independent living program, for a reason. It's hard to get 20% out of a Sleep Number Bed or a greenhouse. There's no money in it. I do represent my fellow Viet-Nam Veterans in the pursuit of their benefits.

But primarily the reason we're here fighting this is I was granted a greenhouse by Vito -- Judge Clementi for a very good reason. It's a medical reason. I can't go out and enjoy gardening during the summer months. I can't go out in the winter into any greenhouse without heating in it. I have a 6 foot x 8 foot greenhouse right now that was given to me when my mother-in-law died. Up to that point when I was filing for this she owned it and she has no use for it, but she

still owned it. I didn't. The VA VR&E officer made all kinds of conclusions about the fact that I only needed another 6 foot x 8 foot greenhouse or somehow to join two of them together to make it larger. And they were offering heat in the form of a 60 watt light bulb on the ceiling, no water, a gravel floor. I use a walker during the winter because I find it very difficult to walk. I scheduled this hearing in 2019 and I haven't gotten any better since then. I still have these disabilities.

JUDGE: Well and you're -- and you're rated for them. I mean, you're getting a 100% rating. You're getting the maximum amount of compensation allowable by the law.

VETERAN: Correct.

JUDGE: And you have been for a really long time. So your disabilities are compensated.

VETERAN: Right.

JUDGE: And I'm just telling you that I understand, you know, why you want the larger greenhouse, but this law is very limited. And if you can live independently and you can represent other clients that means that you're not so disabled that you can't function independently. I mean you -- you -- I just -- I'm not -- I'm not -- I'm not convinced that you meet the criteria for continuation of this benefit.

VETERAN: Well let me put it to you this way. The VR&E program, the independent living program has a limit of 2,700 people per year.

JUDGE: I'm aware.

VETERAN: That's established by Congress. It's for the most severely disabled. I am classified as severely disabled. There's no financial component associated with the independent living

program. If a man was a millionaire, he would still be equally qualified to entitlement to the IL program as much as a homeless Veteran would be entitled to it. There's no drawn -- there's no delineation by Congress in 31.20 that says there's a means test for the independent living program other than that you qualify for the program by virtue of your disability. And if someone like a *Shedden/Hickson/Caluza* entitlement inasmuch as you have to accomplish -- you need a nexus letter from a vocational therapist or vocational rehabilitationist that states that you would benefit from the program. And that's why I applied and that's why I am before you today is because I was given this benefit based --

JUDGE: I'm well aware.

VETERAN: And --

JUDGE: I have reviewed the file and I know that the Board granted the claim, the initial claim.

VETERAN: Um-hum.

JUDGE: And my point is that I -- this isn't about what you want.

VETERAN: No I understand.

JUDGE: And -- and I'm sure that you would agree that despite the fact that somebody could be a millionaire and potentially be also entitled to this benefit, certainly wouldn't you want this benefit to go to somebody who was truly homeless, who really couldn't function in day-to-day life, really couldn't function? I mean that's, you know --

VETERAN: I believe --

JUDGE: -- there's only so much money delineated for this program and the purpose, the intent

of the program was so people who were so completely disabled to help them so that they didn't sit around and do nothing.

VETERAN: That's right Your Honor.

JUDGE: And you're not sitting around and doing nothing.

VETERAN: No, I like to garden and I like to represent Veterans. My flying back here today is simply because I waited -- I enjoyed the legacy system and that's gone now. They shoved me into the AMA by delaying my SOC for a year. That's why I have to -- this is my legacy hearing so to speak.

But, more importantly, I would ask you if you are familiar with MOP, Military Order of the Purple Heart, Secretary of Veterans Affairs are you familiar with?

JUDGE: I've been doing this for 20 --

VETERAN: I'm not trying to insult you.

JUDGE: -- 23 years.

VETERAN: Thankfully and I'm sure you're familiar with *Macklem vs. Shinseki* perhaps?

JUDGE: I -- I haven't looked at the case law yet because I have been too busy looking at the statute and the regulations.

VETERAN: Okay, well, after a prolonged disagreement with VR&E over 21.92 (a) that the IL program will be developed in conjunction with a Veteran and the counselor, the VR&E officer -- there's a group of people who will all be equal shareholders or stakeholders, shall I say, in this

endeavor. The VR&E folks --

JUDGE: Okay, so why -- why is a bigger greenhouse going to make you more independent than the greenhouse that you were allotted?

VETERAN: I produce quite a bit of foodstuffs and donate them to the food bank and to disabled Veterans in my community, food-challenged Veterans. I take any monies -- oftentimes monies that I make from any kind of representation for Vets and help pay disabled Veterans' electric bills, mortgage payments, rent payments, things of that nature.

JUDGE: So where is that in the regulation that says that that is a need? That is a requirement under this program?

VETERAN: Well it's maximum independence in everyday living.

JUDGE: And that's for you, not for other people.

VETERAN: And -- please allow me to finish -- and how I can help other people in my community and integrate with them.

JUDGE: Okay. I don't --

VETERAN: It's in some ways to self-actualize. Judge Clementi agreed with me inasmuch as he says it was a wonderful thing that I am helping other Veterans, that I have the ability to do that. My wife helps me, my son helps me, my neighbors help me. I am integrating with the community. I'm making my community a better place to live.

JUDGE: And I think --

VETERAN: And I'm maximizing my independence.

JUDGE: And I think that that is commendable. But that is not the purpose of this program.

VETERAN: Well Judge Clementi disagreed with you to a certain extent on that. And I will just leave it at that.

But as it relates to *MOPH vs. Secretary of Veterans Affairs*, after extremely long period of arguing with the VR&E officer in Seattle the first thing he did was spend five months attempting with the director of VR&E services here in Washington to ignore or deny that he had to follow the directives of the BVA decision. He finally was told by the director that he had to -- had to provide me with the greenhouse. Under 21.92(a), as I mentioned, it had to be agreed to by all of us together. The VR&E officer in Seattle has plenipotentiary powers. He's not controlled by the VR & E in Washington. If you look at it on the organizational chart, each VR&E officer in each locale of the United States is in complete control of his program. He doesn't need authorization for money spent for anything.

JUDGE: Okay, but why do you believe that what you have been given thus far isn't adequate under --

VETERAN: Because --

JUDGE: -- the program?

VETERAN: Because, Your Honor, I have this bid. It's in the file in my VBMS file and it's dated 10/14/2016. It states, "Based upon the discussion of VR&E BVA orders and consideration of your service-connected and non-service connected disabilities, we are going to give you a 20 x 28 greenhouse" signed by the counseling psychologist. Later on, on 4/10/2017 that VA counseling psychologist and I signed an agreement mutually agreeing to the 20 x 28 greenhouse

with these certain accoutrements that come along with it; a hydroponic system because my hernias and my chest --

JUDGE: Is that written anywhere?

VETERAN: Yes, ma'am.

JUDGE: Okay.

VETERAN: If you have got the VBMS file pulled open you can see it on 10/14/2016.

JUDGE: But are there notes of the meeting where you agreed upon it?

VETERAN: Yes, ma'am.

JUDGE: Okay.

VETERAN: I can't remember the date, I would have to look it up, but I believe the date that he and I discussed this was, according to his report -- according to his report that was 10 -- October 4<sup>th</sup>, 2016. We sat down and he says let's come to a mutual agreement here. Just for argument sake, let's say that I can give you a 20 x 28 greenhouse. I said okay. He says I am amenable to that. We formalized it on 10/14/2016. As I said, on April 10<sup>th</sup>, 2017, Your Honor, yes April 10<sup>th</sup>, 2017, we both signed a mutual statement of work that says that's what he was going to provide. That's a binding agreement with the Veterans Administration. Just like *Macklem vs. Shinseki* they issued a rating.

JUDGE: And we have that in writing and he signed it?

VETERAN: Yes.

JUDGE: Okay. Then what happened after that?

VETERAN: They sent it off again to Washington, D.C., asking for confirmation and authority to purchase and provide me with this. But what they sent to Washington, D.C., was permit and purchase a 10 x 15 greenhouse. There was no -- no discussion it was 20 x 28 that we had already mutually agreed to and signed around.

JUDGE: So did that have to be approved, that larger greenhouse --

VETERAN: No.

JUDGE: -- have to be approved by anybody?

VETERAN: No it didn't and reason being, as I just mentioned, each VR&E officer has the authority to administer his VR&E IL programs locally without any oversight from Washington, D.C., none whatsoever.

JUDGE: Okay, well, I don't know that that -- I don't -- I don't -- that didn't even cross my mind. So I will have to do some research into that.

VETERAN: Well I have all -- all the paperwork is in VBMS. I had to really beat them over the head to get them to upload it. They refused at first. I asked for a copy of my CER file. They acknowledged my request. They never mailed me a copy of it. When I got access to VBMS myself it was only then I discovered the perfidy of what they accomplished here; that they promised me one thing and that's what I thought I was getting. I had a reasonable expectation that the counseling psychologist had the authority to sign the documents. He was assigned to me. He was the one -- my point of contact throughout the whole process.

JUDGE: Okay.

VETERAN: However, the VR&E officer the very first time he met me says I don't believe you are disabled. I think you're pulling everybody's leg. I don't think you're entitled to any of this. Your Honor when I applied for this I was horribly disabled.

JUDGE: Well and -- and, like I said, I can -- based on what you are telling me I am more understanding as to your disability at that time. But you don't need to prove how disabled you are because you are getting a 100% rating. So that means that you are totally disabled. Okay?

VETERAN: I am.

JUDGE: But your hepatitis C rating is protected because it's been in effect for over 20 years.

VETERAN: So is the porphyria.

JUDGE: Okay, but you can cure hepatitis C now.

VETERAN: I am cured, Your Honor.

JUDGE: Okay. So you shouldn't be getting a 100% rating for hepatitis C if you don't have it anymore.

VETERAN: If you have it for 20 years, Your Honor, it's protected under --

JUDGE: And -- and that's just abusing the system.

VETERAN: I'm not gaming the system, Your Honor. I have a verified need and a BVA decision that states that I am entitled to a greenhouse.

JUDGE: And you got your greenhouse.

VETERAN: I didn't get my greenhouse. I argued for a larger one because I provide to the community. I maximize my abilities. All this was before I became accredited, Your Honor.

That's --

JUDGE: So did they not give you the greenhouse because you appealed the -- your case has been in appeal status?

VETERAN: That's correct. I have never seen the greenhouse. We had a mutual agreement for a 20 x 28. Everybody was copasetic. We signed around. I thought the thing was in the bag. I thought that was all going to be accomplished. Nothing ever happened. I finally started querying the -- the VR&E folks and they said, well, we haven't got it back from Washington, D.C., yet. I said --

JUDGE: Well then clearly they needed some sort of approval.

VETERAN: For the financial number, not for the physical 20 x 28 greenhouse. There was -- he didn't have to sign off on the size of the greenhouse. That's determined -- each individual VR&E officer has complete --

JUDGE: Okay and --

VETERAN: -- authority --

JUDGE: -- where in the regulations does it say that?

VETERAN: You will have to look for the organizational chart. It shows that the director of VR&E services is merely an advisory capacity for all the different VISN's I think is -- that's the -- VHA's designation for it, but there are certain geographical areas that are blocked off. I believe Mr. Boyd has the area including Montana, Idaho, Washington and Alaska for his VR&E

assignments.

JUDGE: So I get that you were approved for this greenhouse. And I get that some point that you two agreed on a size and then at some point it was decided that you were going to get a smaller size, okay? So my question is I don't even think that you are eligible for this program because you don't need independent living services. You got on an airplane and you flew here. You represent Veterans. You were able to get accredited before VA. You work. So that's not what the VR&E program as a whole was established for. Once your situation, your ability to work is feasible you don't qualify for the program anymore. And this is just a subset of the program that is reserved for the most disabled people who can't function at all and they need something to do to keep them alive basically. I mean this is a serious, serious, serious --

VETERAN: Um-hum and --

JUDGE: -- situation and I'm not seeing that of you. So instead of arguing about the size of the greenhouse why don't you just take what they have already given you? I mean I don't -- I'm going to be really hard pressed to find a legal way to get you what you want based on the way the law is written that I see it right now.

VETERAN: Well I have -- as I said I have a promise, I have a guarantee, I have a proposal and I have an agreement signed by the Secretary's designated authority, who happens to be a counseling psychologist, vocational rehabilitation counselor, VR&E officer who mutually agreed with me that they were going to give me a 20 x 28.

JUDGE: Okay. So what did they tell you when they said -- came back and said, oh, we're only giving you this much? What -- why did they say that they were doing that?

VETERAN: They didn't. They baited me with this 20 x 28, which we agreed to, and they sent back financial authorization for a 15 x 20 unbeknownst to me. I couldn't see this. They

wouldn't give me copies of the records. I didn't know it until I got access to VBMS. I did not realize what they had done to me. All I knew is that I didn't have a greenhouse of any size or shape. And they wouldn't tell me what I was getting until I physically filed a 21-4138 begging them to give me the decision from the director of VR&E in Washington. I -- they only gave it to me if I presented myself in person at the Seattle regional office. They wouldn't mail it to me.

JUDGE: Probably because you certainly don't look like you qualify for this program in the first place.

VETERAN: Ma'am when you --

JUDGE: I mean this program was not created for people like you.

VETERAN: Yes it was.

JUDGE: The fact that you're getting 100% for your disabilities that was created for you and for similarly situated Veterans that do in fact have wounds and diseases and disabilities based on their service. The VR&E program was established to help people rehabilitate so that they can become employable in a feasible career based on their level of education, their qualifications, their mental status. That was the reason they created the program. It wasn't so that somebody could have a greenhouse so that they could give back to the community. That's not the purpose of this program. The purpose is to help people that are desperate, desperately in need. And that's why I have a problem with this.

And I understand that this benefit was already granted from you and I cannot take that away from you unless I find fraud which I don't. But, with respect to the size of the greenhouse you could get your greenhouse based on what they ultimately determined. And it's I have a suspicion that they put in your request and somebody said no way.

VETERAN: They are not operating on all the information, first of all Your Honor. I have tried to inform my vocational rehabilitation officer and even provided him with the medical records and I don't see them anywhere in VBMS. 2016 due to my phlebotomies they take a pint of blood out of me every month. They can do that for eight months, Your Honor. You can't see that in me right now. After eight months my ferritin level gets so low that I start to get tachycardia.

JUDGE: Okay. So are you treated by private providers or through the VA?

VETERAN: Yes, ma'am, I am. But I did provide these records and showed them to my VR&E officer. I had congestive heart --

JUDGE: Well now that you are an accredited representative you can upload them yourself.

VETERAN: I could but I gave -- at the time that this occurred in 2016 I had congestive heart failure. And if you observe 31.20 or I believe it's 21.160 authorizes the VR&E programs for service connection as well as non-service connected diseases. My stomach hernias, six ventral hernias, are not service connected either. They're a direct --

JUDGE: But if you -- but if you have evidence that they exist and you have the capability of providing all of the medical evidence, then --

VETERAN: But I don't --

JUDGE: -- that would be your -- that would be your first step in providing evidence that you are entitled to the program.

VETERAN: I am entitled to the program. That was determined by Judge Clementi. That -- that ship has already sailed, Your Honor.

JUDGE: And they gave you a greenhouse. So now all we are talking about is whether or not you should get what the initial proposal indicates which, again, I don't have -- I haven't had time to go through the entire file, so I've only done a very cursory review, and why you didn't get what was agreed to by you and the VR&E counselor.

VETERAN: The 15 x 20 greenhouse was provided to me on the basis of being able to lift 50 pound sacks of potting soil and plant -- my plants in a greenhouse.

JUDGE: That difference would it make the size of the greenhouse based on how much you can lift?

VETERAN: How much you can grow inside of it. They contemplated when you are designing --

JUDGE: You don't have to bring all of it in at once.

VETERAN: Well, Your Honor, I won't argue with you on that. What I came here to argue is that I believe that there is a violation here of three things. *Reonal vs. Brown* sets a factual predicate for my award of a 15 x 20. The factual predicate was in error and therefore the opinion has no validity. The second thing, as I said, under *MOPH vs. Secretary of Veterans Affairs*. So I was promised a 20 x 28. Regardless of whether you believe I am entitled to it or not, I was promised this entitlement, so to speak. It was given to me. The VA can't renege on it unless they can find out I obtained it by an act of omission or commission. And I have not presented any false evidence to anyone about the quality or the capability of my abilities to maximize my activities of everyday living.

I sit behind a desk in a house the majority of the time from October until June, until it gets warm enough outside, to go out and garden outside. I have to do it early, early, early in the morning.

JUDGE: But you are independent during the months that you are not gardening. You work.

VETERAN: I'm not independent. I cannot go out to my greenhouse. Everybody is entitled to go outdoors.

JUDGE: Of course, but that's your disability. That doesn't make you incapable of employment.

VETERAN: So I shouldn't be allowed to file a Notice of Disagreement and disagree with this?

JUDGE: You can absolutely file a Notice of Disagreement and you have every right to. And my job is to determine whether you're entitled to more than what you got.

VETERAN: Am I entitled to what I was promised?

JUDGE: And -- well that's -- you know that's --

VETERAN: That's why I'm here today.

JUDGE: -- not in the regulation. So this is -- this is a gift. It's a -- it's a -- it's something that you get that the taxpayers pay for. So I don't really think that being promised something and then changing the promise is -- necessarily entitles you to what they said they were going to give you in the first place.

Now, again, I'm not going to make a decision in this case until I am absolutely, positively sure of the law and the regulation. And hopefully I will be able to find out why they promised you one thing and then decided in the end that you were going to get something else instead. Hopefully I will be able -- that will be clear in the record. But I can tell you that if you think that it would be helpful to upload your medical records to show, in fact, how disabled you are I am sure that that would help your cause.

VETERAN: That was provided to the -- to Judge Clementi. He was aware of my phlebotomies at the time he granted this.

JUDGE: So --

VETERAN: I can go eight months --

JUDGE: -- then when -- if -- then he had -- then it had to have been in the record.

VETERAN: Approximately four months of the year, Your Honor, after eight phlebotomies my -- it's called your -- it's a chemical in your blood, it depletes it so much my body doesn't replenish it anymore. And that's what caused my cardiac arrest.

JUDGE: So why --

VETERAN: My tachycardia.

JUDGE: -- why -- you believe that you're entitled to the larger greenhouse because that's what you were promised. But what -- this is based on need. So why do you need a bigger greenhouse? I know you want to give back to the community.

VETERAN: Right.

JUDGE: But the VA shouldn't be paying for that. The VA pays for Veterans and their families and survivors who have disabilities and who qualify for loans and VR&E and education benefits because they served in the military.

[REDACTED] the whole program of independent living has been almost obliterated. There are 2,700 openings per year. The VA, in spite of that, you would think there would be people knocking each other down declaring how disabled they were to take advantage of this program, which is not monetized. There's no -- I'm sorry you can only get 15,000 worth of ILP. If it required 150,000 a Veteran would still be entitled to once he has been granted the entitlement. You might want to argue over the size or the scope or what not, but it's not a monetary entitlement. It's an entitlement. It's -- it's a benefit that is earned by being severely disabled. You might look at me and not see me as severely disabled, but after eight phlebotomies I sit inside for four months. I have a hard time thinking in order to write legal briefs because of this disability.

JUDGE: But that's why you're rated at 100% disabled. It's not about how -- this program isn't about how disabled you are. It's about your capability of being rehabilitated to the point of employability.

VETERAN: I haven't been rehabilitated yet.

JUDGE: And this program is for people who have been determined that they're never going to be capable of working or that they certainly won't be for the short-term.

VETERAN: I disagree. It doesn't say never. It does not say never, Your Honor.

JUDGE: Okay.

VETERAN: It says --

JUDGE: But when you become feasibly employable you're no longer entitled to the benefit because you're rehabilitated.

VETERAN: If a person is 20-year protected under 951 or 952, 3.952 I believe it is, 20-year protected and you didn't accomplish it by omission or commission or some fraudulence --

JUDGE: But you're protected --

VETERAN: -- would that give --

JUDGE: Your disability rating is protected. This is a different --

VETERAN: Right.

JUDGE: This is not about --

VETERAN: But would you think that there would be some provision that you're not entitled to remuneration, compensation pay simply because you have been -- your hepatitis has been treated and you're in remission --

JUDGE: The purpose of-- the purpose of disability compensation is to pay you for your lost ability to engage in employment. I mean it's -- it's that -- that's what -- it's to -- it's to make up the difference between --

VETERAN: Um-hum.

JUDGE: -- what you have lost --

VETERAN: Um-hum.

JUDGE: -- and to make you essentially whole, okay? That's different than the VR&E program. It's a different scope. It's a different program. It's not -- the purpose of the program is to help

Veterans become rehabilitated. And whether that means try to get a different career path or whether it means see -- determine whether or not employment is ever feasible that's the point of the program, the underlying point of the program.

VETERAN: Sure, but if you promise somebody something and everyone agrees to it, and I assume that the Secretary has delegated this authority to these people and they agreed to give me something and then renege on the very thing they promised me they were going to give me, that's breach of contract. I know --

JUDGE: And breach of contract --

VETERAN: -- when you have a breach of contract with the VA.

JUDGE: Well and breach of contract is not -- I mean can't you file a claim -- a tort claim or a -- or, you know, whatever, you know, file with the Claims Court? I mean this isn't about breach of contract.

VETERAN: Well it is. If you have *Macklem vs. Shinseki* you would understand that Your Honor. It's very clear. They promised Mr. -- Mr. Macklem a certain benefit. They mailed out a -- a rating decision that said we are going to give you your rating for 70% all the way back to 1950 when we cued you and took it away from you. It was mailed to him. The Court said he's entitled to it. The Federal Circuit said he's entitled to it because you gave it to him. You can't take it back once you informed him that he got it.

JUDGE: You can take it back if you find that there was a clear and unmistakable error.

VETERAN: No you can't and I would suggest you read *Macklem vs. Shinseki*.

JUDGE: I'll read it. And that's not this --

VETERAN: I would like you to --

JUDGE: That's not what's going on here.

VETERAN: I would like you to look at this as an *Karnas vs. Derwinski*. As an accredited representative I don't have any legal training, so I would ask you for a sympathetic reading of my --

JUDGE: And I will. I mean, I will look at the law and if this falls within the legal framework and --

VETERAN: Well if you don't mind my saying so, this sounds very adversarial Your Honor.

JUDGE: Well and I -- I am just trying to understand why you believe that you're entitled to a larger greenhouse. So --

VETERAN: Because I was promised one.

JUDGE: And that's what we're here for is to find out why and that is why. So --

VETERAN: That's all -- that's all I can offer you is they told me, you know, this is what you're going to get Mr. Graham. And I proceeded on that and I knew I was disabled. I have a brand new congestive heart failure rating. I managed to obtain six ventral hernias because the VHA installed a piece of something called AlloDerm in my belly on the fourth surgery after it failed.

JUDGE: Look there's no -- I'm not questioning --

VETERAN: Well --

JUDGE: I'm not questioning –

VETERAN: -- that's why I have the hernias.

JUDGE: -- that you have disabilities and I'm not questioning that you have your 100% rating. That's never going away. I'm not questioning it at all. It's yours, you have it. You are disabled. That's not why we're here.

VETERAN: That's exactly why we're here, I'm severely disabled. My porphyria -- let's just set the 100% for the hepatitis C aside and focus entirely on the porphyria. It impacts my ability to maximize my living -- my independence in everyday living. I can't go out in the sun. I can't go out in cold weather because of the cryoglobulinemia.

JUDGE: And that's why you're giving 100% rating to -- for your impairment in earning capacity. That is what a rating -- disability rating is for.

VETERAN: Imagine you had to pass a qualification test Your Honor you have to be this disabled to qualify for this program. In this case for ILP you have to be more than 20%. That's the baseline.

JUDGE: Understood.

VETERAN: I'm far past that.

JUDGE: Understood.

VETERAN: But once I had met that metric it's immaterial how much I might make as an accredited representative. That's immaterial to the program.

JUDGE: Well why do you think that you should get the benefit versus somebody else who is not capable of being rehabilitated to the point of being able to -- for employment? Why? Why do you deserve it more than --

VETERAN: I don't have to know that. I was promised something.

JUDGE: Okay.

VETERAN: I -- the -- the VVA created the decision on December -- September 4<sup>th</sup>, 2015, that said you're entitled to this Mr. Graham and you and your VR&E people need to go out and mutually agree upon the size. They did not do that.

JUDGE: Okay, well, supposedly there was a meeting that you didn't attend that it was --

VETERAN: No, it wasn't.

JUDGE: -- agreed upon -- it was the agreed upon size.

VETERAN: No it wasn't. We were still in disagreement. They -- after that came back from the VR&E director who didn't -- had no authority to review it, when it came back they informed me that I was getting a 15 x 20 and I asked them what happened to the 20 x 28? They said well we are not discussing that. We are talking about a 10 x 15. There was never any discussion about this 20 x 28.

JUDGE: Okay, but is that what you're telling me that you agreed upon? I mean why is that a valid contract? I mean perhaps the way this works is you agree upon something and then the VR&E people go to a higher power and said this is what we agreed on and somebody says, no, that's not going to happen.

VETERAN: 21.92(b) says that the implementation of the contract will be a mutual decision between the same people I just mentioned earlier under 21.92(a).

JUDGE: Okay.

VETERAN: Again that never happened.

JUDGE: But you know what though? You're --

VETERAN: Why have a regulation --

JUDGE: I can't imagine that --

VETERAN: -- if you're going to --

JUDGE: I can't imagine that -- that you would be an equal partner in determining your need because that's something that the counselor determines and the people that work with you determine. I mean you can suggest this is what I need, but that doesn't necessarily mean that's really what you need.

VETERAN: I was never -- I never got a chance to suggest anything, Your Honor. At the moment I won they unilaterally decided on a 15 x 20 without consulting me. They arrived at a bid, and that again is in VBMS in June of 2016.

JUDGE: Okay.

VETERAN: They agreed and they said we have a winning bid. The VR&E officer came to me in April of 2016 and handed me a blank statement of work and said sign this. I said what am I signing? He says that you're going to get a greenhouse. I says well where does it say what size?

He says well don't worry your pretty little head about that, we'll fill it in. I said, well, I need to know what size it is going to be. I don't want to get something --

JUDGE: Okay.

VETERAN: -- which I ended up with.

JUDGE: I get it, I get it. You were promised one thing, you didn't get what you were promised and you don't know why.

VETERAN: They knew I had these ventral hernias. That's in the record.

JUDGE: Okay.

VETERAN: That was all treatment at VHA.

JUDGE: I got it. But this isn't --

VETERAN: They knew --

JUDGE: This isn't entitlement, it's a benefit.

VETERAN: That's right.

JUDGE: It's not a contract.

VETERAN: They're giving me an entitlement I can't use.

JUDGE: It's not a contract.

VETERAN: They're saying go ahead and erect your 15 x --

JUDGE: This is -- you didn't have to pay for a service that -- and the service was not what they told you it was going to be. This is a benefit. You're taking taxpayer money --

VETERAN: Um-hum, it's not a --

JUDGE: -- for your benefit and they agreed that you needed the benefit.

VETERAN: Um-hum, it's a grant.

JUDGE: So they gave you the benefit. So the fact that we're --

VETERAN: It's a grant but it was --

JUDGE: But it was -- we're --

VETERAN: It was granted.

JUDGE: -- we're fighting over a size. I'm just -- I don't understand why we're fighting over a size.

VETERAN: I desired a larger size so that I can grow more foodstuffs, not more for the community, more varied stuff.

JUDGE: Okay, but why -- why will that make you more independent? I mean this is about independent living. You're already independent.

VETERAN: That's exactly right and it maximizes my -- my independence in everyday living

and one of the few things that I have to look forward to in life, because I can't build houses anymore, I can -- I can adjudicate Veterans' claims. That you might call a job. I call it a vocation just as much as being a preacher to his community, to his congregation. It's not a monetary gain. You can call me employed if you will, Your Honor. You can certainly use that term.

JUDGE: And it's not even about being employed. It's about feasibility.

VETERAN: Well perhaps read VA OGC precedent 6-2001.

JUDGE: I'm going to -- trust me.

VETERAN: That discusses being able to go out and enjoy the outdoors. Everybody is entitled to that.

JUDGE: Right but some people can't.

VETERAN: That's right. And that's what 6-2001 --

JUDGE: There are some people --

VETERAN: And that's what --

JUDGE: -- that are old that have arthritis or they have frostbite and it's not service connected and they can't go outdoors, but no one is giving them a greenhouse.

VETERAN: Well all I can say is perhaps you need to review the OGC precedent.

JUDGE: I'm going to review everything.

VETERAN: And you might look at 34.97 also while you are at it, Your Honor, because that's what I predicate my whole argument on and it's very well founded legally.

JUDGE: And I will --

VETERAN: I wouldn't waste your time I assure you.

JUDGE: Well and I will review it and I will try to see -- find something in the record that explains why they told you one thing and you got something else because that's really what this argument is all about.

VETERAN: That's right. This is an example of a resurrection of the accessible awards program from 2007. We promise you one thing we're going to give you another. We're not going to tell you about it, we're just going to have a secret in-camera review in Washington, D.C., which is unauthorized under all the regulations, and come back and give you something less. We're going to abbreviate your grant.

JUDGE: Well and it's also based on your need, it's not based on your want.

VETERAN: The authority doesn't rest with the VR&E director in Washington, D.C. All I can tell you is I looked it up and the organizational chart for VR&E does come under VVA, and that's about as far as it goes because the director has no authority to tell his underlings in each individual regional office or each area of responsibility what they should adjudicate, how large a --

JUDGE: Okay but here's the thing.

VETERAN: -- greenhouse should be.

JUDGE: Let's take this for an example, okay? Suppose they said we agree you need a greenhouse and they put together the proposal and you agreed with the proposal the 20 x 28. And then they come back and they say, oh, we can't give you the 20 x 28 and so you appeal to the Board. So now I do have the authority to make the determination.

VETERAN: Yes you do.

JUDGE: So it's not that the buck stops with the VR&E counselor. I mean --

VETERAN: I'm not implying that at all, Your Honor. I'm just -- that would be below. You're a higher tribunal than the AOJ, than the VR&E director. I'm not questioning your ability to litigate this. In fact, that's why we're here. That's exactly the way the chain of command works. All I am arguing about is this award was lawfully granted by a VR&E officer who shipped it off to his senior party in Washington D.C. the VACO. That person made a decision that was impermissible as to size.

JUDGE: Okay. Why -- where is the authority? How is it impermissible?

VETERAN: That, Your Honor, is something you might have to take up with the Secretary. He is the one that arranged the table of organization for VR&E and gave each individual VR&E officer at each individual regional office authority to completely litigate, from start to finish --

JUDGE: What if the VR&E counselor made a mistake and he thought that he was given appropriations of "X" amount of dollars and when he went to get the final proposal approved they said, no, we don't -- we don't have the money? I mean you need an answer. You --

VETERAN: There's no financial.

JUDGE: But you need an answer as to why you were promised one thing and you were told

later that you were getting something different. You -- you want that answer because you don't know and I don't know either. But I think we should find out.

VETERAN: I dug this out in July 2, 2016, the Seattle regional office VR&E officer asked for an advisory opinion on how big a greenhouse he could give me, what was the dollar value of it, yada, yada, yada. He asked for the authority and what the parameters were. On August 11, 2016, the director of VR&E services stated in accordance with 38 C.F.R. 21.98 and M21 -- M28 the local VR&E management staff has the authority to exercise professional judgment in reviewing decisions relating to development of a rehabilitation plan and adverse action. The director of VR&E services reviews decisions relating to eligibility and entitlement to VR&E benefits and the development of a rehabilitation plan in cases where the local VR&E management is the case manager.

JUDGE: Okay, so that's the M28.

VETERAN: That's M28-R. Under *Karnas vs. Derwinski* we have to use the one most favorable to me.

JUDGE: Not -- we are not bound by the -- by the manual.

VETERAN: In 19 --

JUDGE: We're not bound by the M21. We're not bound by the M28.

VETERAN: I understand that completely, but if -- if -- these people are -- in 2011 there was an M28-1. They become far more stricter in -- March 31<sup>st</sup>, 2014. It changed, harmful to me, in 2014 before my BVA decision. *Karnas* even though it was overruled by *Kuzma* on other grounds still states that I am entitled to the most favorable reading of a regulation. And this changed the regulation. This M28-R changed the regulations. And that I argue as well is an

example of making a decision that has no authority -- they had no authority to implement the M28-R and forced that down my throat and telling me what they were going to give me and what they weren't going to give me. I believe I'm on firm legal ground.

JUDGE: So you're saying that your claim was filed during a time period when you -- when the old law was in effect?

VETERAN: Yes, ma'am.

JUDGE: Okay.

VETERAN: It was decided under the old law by Judge Clementi under M28-1. They implemented M21 -- M28-R in, as I said, April -- or May -- March of --

JUDGE: Okay but --

VETERAN: -- 2014.

JUDGE: But that still doesn't explain why you had an agreement for a 20 x 28 and you ended up being told you were getting what's -- what is the one that they said they were giving you, a 20 x 15?

VETERAN: They were originally going to give me a 15 x 20. I argued for a larger one. They agreed to the larger one and then they gave me -- they authorized the smaller one.

JUDGE: Okay.

VETERAN: But, as I said, the authority to -- to grant any size greenhouse does not rest with the director of VR&E services in Washington, D.C. He's not allowed to determine eligibility as

that --

JUDGE: I understand your argument and I can't, you know -- it's duly noted. I will have to take a look at what the statute says, what the regulation says. And all this is in the recording, so I have a lot to go back through and review, and I will.

But to think that you could have had your greenhouse a long time ago and we are arguing --

VETERAN: Five years ago.

JUDGE: -- about how many feet just doesn't -- I don't understand. I mean if this is to help you in your life --

VETERAN: It is but it would make no sense to give me something that is functionally useless. They are asking me to lift 50 pound bags of dirt. I can't do it. I have six ventral hernias. I can't lift 15 pounds and have been lifting 15 pounds.

JUDGE: But I don't understand why --

VETERAN: And that's why I have six hernias.

JUDGE: But I don't understand why a bigger greenhouse would make you not have to lift 50 pounds.

VETERAN: Your Honor I don't have any argument for that. I have a legal argument, not an emotional, personal argument. I'm basing it on law.

JUDGE: I understand.

VETERAN: Case law, law, that's all I'm basing it on. I'm not sitting here asking you to look at me and say, gee, Mr. Graham, you just don't look disabled.

JUDGE: It's not about that. It's not about looking disabled. It's about having a severe employment handicap. That's what the VR&E program is.

VETERAN: I do. There's a number of jobs that I will no longer be able to do that I was trained to do that -- for whatever reason. I took it upon myself to go out and learn VA law. It took me 18 years to win my claim. All my records were at the CIA because I flew for Air America even though I was in the Air Force. It took them 18 years to find my records and say, gee, Mr. Graham you were in Viet-Nam after all. You are a Nehmer class Veteran. It took me that long. It took me another eight years on top of that to get the porphyria attached because I had to prove I was in Viet-Nam. I did that. I have been at a disadvantage for a total of about 28 years before I got all my benefits lined out and agreed to. Then I had to go back and fight for the earlier effective date.

JUDGE: I'm well aware.

VETERAN: Oh I didn't know that you saw that. Yeah they did bounce me back to '94. They never answered -- they never answered my -- well I filed a NOD and they never answered it.

JUDGE: So I get it, I do.

VETERAN: Anyway that's where we're at Your Honor. All I'm looking at is if you're promised something, just as Macklem -- Leroy Macklem was promised --

JUDGE: Right, but a disability rating and a rating decision is different --

VETERAN: They called it a proposal.

JUDGE: -- and a grant of service connection is not -- is -- you can't -- you're comparing apples and oranges. If you're trying to compare something where he was entitled to compensation for a disability that's not the same program so the same law doesn't apply.

VETERAN: *Macklem* stands for a proposition that if you make even a proposal and supply the Veteran with the proposal and they renege on the proposal and say, no, we made a mistake, I'm sorry.

JUDGE: Well if you --

VETERAN: They didn't declare a cue. They just said I'm worry we -- we --

JUDGE: Well, that happens every day. The VA will send out checks that they should not have --

VETERAN: Um-hum.

JUDGE: -- and they'll say, whoops, we're sorry, we made a mistake. I mean it's not --

VETERAN: Um-hum, this isn't a mistake. It's right here in writing, we are going to give you -- it says we will --

JUDGE: Well I suspect --

VETERAN: The following IL services at VR&E will provide --

JUDGE: And I suspect --

VETERAN: Will is --

JUDGE: -- that at some point somebody higher up said no. And I don't -- and I don't know because I --

VETERAN: Well --

JUDGE: I don't know but --

VETERAN: -- there is a lot of case law that says the use of the word shall and the use of the word will is mandatory, it's compulsory, it's not permissive.

JUDGE: Well that document isn't a statute or a regulation.

VETERAN: No it's not but this is -- this is a VA document that's signed by --

JUDGE: Certainly.

VETERAN: -- by somebody who represents the Secretary. They --

JUDGE: And like I said I will look at it and I will --

VETERAN: They never reneged. They never called us a cue. They just dropped it. It's like it doesn't exist.

JUDGE: Well hopefully when I look through the file I will be able to figure out why.

VETERAN: This was mutually arrived at under 21.92(a) finally.

JUDGE: And, again, I would encourage you to submit your private records if you are concerned that people don't think you're as disabled as you are. I mean I'm not even talking about being

disabled. I'm talking about being entitled to the program. So --

VETERAN: That ship has already sailed.

JUDGE: I'm well aware. I'm well aware.

VETERAN: But I don't have to relitigate that.

JUDGE: No you don't.

VETERAN: That's res judicata. I'm entitled to a greenhouse.

JUDGE: I understand.

VETERAN: We're just discussing -- well I don't mean to, you know, browbeat you. It's just --

JUDGE: I understand.

VETERAN: All I can ask you to do is read --

JUDGE: You were promised one thing and you got another and you weren't told why.

VETERAN: No it's exactly right. And they wouldn't even tell me that I had been awarded the 20 x 28. They never ever acknowledged it. They never ever said we made a mistake, we gave you the wrong size, we're -- we are going to substitute the old one. There was never any discussion of that.

JUDGE: And, again, I -- once I have a chance to go through your file thoroughly --

VETERAN: I think there should be reasons and bases somewhere here --

JUDGE: But, again, this is not -- a proposal that you agree upon still needs to be approved by somebody.

VETERAN: Right, I'm holding that right here in my hand.

JUDGE: Well and I'm going to look at it.

VETERAN: Yep.

JUDGE: If it's in the file, I'm going to look at it.

VETERAN: Yes, ma'am, it is. But I would point out that you might ask to obtain the original CER file because there's a lot of things that are not in there.

JUDGE: The original voc rehab file?

VETERAN: Yes ma'am.

JUDGE: So that's in your VBMS file?

VETERAN: No they just uploaded --

JUDGE: Okay.

VETERAN: -- various documents.

JUDGE: Okay.

VETERAN: I know that they're not all in there because I -- I didn't bring all of them with me but I have documents I can show that I submitted six photographs in 2012. They're not a matter of record, so I know the record is incomplete.

JUDGE: Okay, well, I can ask for the entire file.

VETERAN: I would. I'm not -- I'm not begging for some benefit that I don't believe I'm entitled to. I have worked my way up gradually, clawed my back to some semblance of health over the last ten years, last 12 years since I -- I spent 14 months in the VA hospital and underwent four operations.

JUDGE: And you're getting 100% rating. And you got a lot of lot back pay.

VETERAN: I was getting 100% rating far before I went into the hospital.

JUDGE: Well and that's what I'm saying. I mean there is no question that VA has conceded that you are totally disabled.

VETERAN: Um-hum.

JUDGE: So whether I agree with that or disagree with that is not relevant. And --

VETERAN: True, well all I can do --

JUDGE: But what is relevant is entitlement to the program and why they promised you one thing and then gave you -- told you they were going to approve another thing instead. So that's my job is to try to figure out why.

VETERAN: Well all I can hope for is a sympathetic reading of my appeal, Your Honor. That's

all I'm asking for. I waited, I've waited and I've waited. I was offered something that I couldn't use, so I appealed for something that I could use. I was promised that and I didn't get it.

JUDGE: And I'm still not clear on why you couldn't use --

VETERAN: I can't lift more than 15 pounds.

JUDGE: Yes but why -- you still haven't explained why that precludes you from accepting a 15 x 20 versus a 20 x 28. I could have the numbers --

VETERAN: Right.

JUDGE: -- wrong but --

VETERAN: A 15 x 20 doesn't have heat, so I can't use it in the winter. It would be useless. It would be literally useless. It didn't have any lights, so you can't grow anything in Seattle in the winter because the sun doesn't even come up over the southern trees on my property. So I'm not going to have a greenhouse that depends on ambient sunlight. That's what I am doing. I was gardening. I've been gardening for 20 years, or more, ever since I became severely disabled and more so after I became disabled. I've still gardened. It is my hobby. Some people ride motorcycles. Some people --

JUDGE: I understand.

VETERAN: -- hang glide. My hobby that maximizes my ability to enjoy life hinges on gardening. I like to do it in the summer. I like to do it in the winter. I can't do it in the summer for the most part unless I do it before the sun gets high enough in the sky because it fries my skin. I can't do it in the cold. Even if I can grow lettuce outside in October, I can't go out there to tend it, fertilize it, water it because of my cryoglobulinemia. So maximizing my ability to -- in

everyday living involves a greenhouse. And the whole purpose of the greenhouse is to grow vegetables. A greenhouse they can grow three tomato plants in and one head of lettuce, that doesn't -- I can eat a head of lettuce in two days. It will take me another three, four weeks, even if I did it hydroponically, to grow another head of lettuce. So, yes, I do need a slightly larger greenhouse to accomplish this. And when I am using my walker I need enough room to maneuver the walker around in that area, and I need raised tables because I have six hernias I can't bend over. I have a bad back and they -- they are aware of that. I have degenerative disc disease. It's bone on bone.

The sum of my disabilities is the predicate for this maximization of daily living.

JUDGE: Okay, well, then you should provide evidence of all of that.

VETERAN: But that ship has already sailed, Your Honor.

JUDGE: Okay, look, I just --

VETERAN: I've proved that I need this greenhouse because of the --

JUDGE: And VA is not an endless supply of money. I mean they are not.

VETERAN: They can't even --

JUDGE: Do you know how many hundreds of thousands of claims we have to deal with, there's such a backlog because there aren't enough -- enough of us? I mean it's -- this is --

VETERAN: Well Your Honor --

JUDGE: You know my job is to make sure that -- that what you get is fair and legal.

VETERAN: If Congress has 2,700 slots open every year and they can't even fill half of them, then I don't think they're maximizing the usage of the program.

JUDGE: But that's what you think.

VETERAN: I don't think I'm stealing.

JUDGE: That's not -- that's not --

VETERAN: Right.

JUDGE: Take it to Congress.

VETERAN: That's right, but earlier you mentioned don't you feel a little guilty about usurping another Veteran who could be benefiting for this benefit because they are far more disabled than you are or homeless or whatever.

JUDGE: Or far more incapable of --

VETERAN: Right.

JUDGE: -- employment feasibility.

VETERAN: All those people who are applying right now for that IL program -- and you're welcome to -- if you can get the Excel spreadsheet from VR&E they quit giving it to me in 2015 when they went below half of 2,700 people. 1,426 claims were authorized. And you know what? They were given -- they were giving sock puller-uppers. They were giving hand grabbers. They were given grab bars in their --

JUDGE: Because they -- they can't bend over and put their socks on.

VETERAN: Right but they asked for a greenhouse and were denied. They asked for --

JUDGE: I think you're missing --

VETERAN: -- a metal detector.

JUDGE: I think you're missing the point here.

VETERAN: I --

JUDGE: The things that you were saying earlier are things that help you live independently so that you don't have to have a nurse in your home every day putting your socks on.

VETERAN: No, no, no, no, you're confusing --

JUDGE: I'm not --

VETERAN: -- SAH and SHA and HISA claims with ILP.

JUDGE: You're the one who just told me they're giving this and they're giving this and they're giving this.

VETERAN: Right, those are SAH program. That has nothing to do with the IL program. That was inaugurated in 1981.

JUDGE: Okay, then why didn't you just say this is what they're giving people?

VETERAN: They used to give people riding lawnmowers, tractors, metal detectors. The list is endless. And then all of a sudden they quit giving these things out.

JUDGE: And that's not what we're talking about today.

VETERAN: That's the IL program, Your Honor. However now --

JUDGE: But what happened to other people and what happened to the program is not why we are here today. We are here today because you filed an NOD to the size of the greenhouse and that's --

VETERAN: That's right.

JUDGE: -- why we are here today.

VETERAN: Filed a disagreement.

JUDGE: We are not talking about other programs or what other people are getting. It's -- you know, none of that matters. And -- and, you know, one VA decision, one Board decision is not binding on another Board decision.

So, you know, the Court creates binding case law but the Board doesn't --

VETERAN: The chairman of the Board is free to have a motion for reconsideration.

JUDGE: Absolutely, but one Board decision is not binding on another Board decision.

VETERAN: I don't know the legality of that. I thought that would be considered res judicata that that stands.

JUDGE: Oh, based on your Board decision? I'm not talking about that. I am talking about when Veterans file claims and they submit other people's decisions that granted their claims --

VETERAN: Yes.

JUDGE: -- and they are trying to say this is the same thing.

VETERAN: No, I'm not trying to do that.

JUDGE: Okay.

VETERAN: No, I've never, ever -- I never, ever proposed that today, Your Honor, never. And I have not presented any evidence in that respect. My legal brief hinges completely on case law.

JUDGE: And I suggest that whatever you can do to show that your employment handicap is so severe that employment is not feasible that you submit that medical evidence.

VETERAN: I don't need to.

JUDGE: Okay.

VETERAN: That occurred in 2015. I don't have to keep re-adjudicating the same determination that I am rehabilitated. I'm not.

JUDGE: But you were already granted a greenhouse. So --

VETERAN: I was granted a greenhouse. I have not seen the --

JUDGE: -- you were granted a greenhouse based on your disability and your employment

handicap at that time, okay? So this is about why didn't you get what you were promised and you got something else instead --

VETERAN: Um-hum.

JUDGE: -- and whether you are entitled to continued independent living services. So with respect to whether you are entitled to continued independent living services, we are in the now.

VETERAN: That's right, we haven't continued. There had been an abeyance ever since August of 2017 where they suspended me until they got the authorization, which they didn't need, and were --

JUDGE: Well --

VETERAN: -- from somebody who was not allowed to authorize it.

JUDGE: Well but that -- again you need to provide me with legal --

VETERAN: I just did.

JUDGE: -- with legal --

VETERAN: I've read it to you.

JUDGE: -- statutes and regulations that support your -- your argument.

VETERAN: Well, Seattle regional asked for permission for it and the VR&E service director said that's not my job, that's your job locally, not -- it's not something that occurs in Washington, D.C.

JUDGE: But why if somebody in VR&E said I'm not approving that, you are going to have to take it up the chain, and the person at the top said I'm not approving that, I will give him this but not that because that's excessive and he can become independent in his living with a smaller greenhouse, then what -- what is the authority for me to say that that's not right?

VETERAN: All the authority is established in Chapter 21 that tells you that if you disagree with it you -- you submit the disagreement to your VR&E officer. He has 90 days to look at it, change his decision or -- or approve or confirm and continue. He did so. I filed an NOD unbeknownst to me that they actually granted me the 20 x 28. I thought it was still a proposal. And --

JUDGE: Well they didn't obviously grant you the 20 x 28 because they came back and said, no, we are only giving you --

VETERAN: They told me they had and sent this off for financial --

JUDGE: Did you get --

VETERAN: -- approval.

JUDGE: Did you get a letter?

VETERAN: Um-hum I got a letter on November 21, 2017, from the director -- his name is Jack Kammerer, Director of Vocational Rehabilitation Employment Service. It said the review of modification construction cost to support a vocational activity is complete. Construction costs, mind you, not the approval for a greenhouse, the proposing -- the proposed construction costs include construction of a 15 x 20. He was approving --

JUDGE: Were you ever given --

VETERAN: -- the financial.

JUDGE: Were you ever given notification in a letter that said we have approved your proposal and you are getting a 20 x 28 greenhouse? That's not a decision letter.

VETERAN: VA form -- it's not a decision letter because they don't issue -- they do not issue decision letters at VR&E. They don't sign -- hand you a rating decision and a code sheet.

JUDGE: Okay.

VETERAN: You don't get that.

JUDGE: Right, I understand.

VETERAN: You get a request for and receipt of supplies. And when both people have endorsed this, they begin the process of providing you with the size of the greenhouse labeled right here 20 x 28 --

JUDGE: But that's --

VETERAN: -- clear and unmistakable.

JUDGE: Okay, but that's not a proposal --

VETERAN: That's clear and convincing evidence.

JUDGE: -- and somebody has to agree to.

VETERAN: It's not a proposal. It's an agreement just as much as a rating decision --

JUDGE: It's -- it's an agreement between you and the VR&E counselors.

VETERAN: Who speaks for the Secretary, who speaks for the VR --

JUDGE: Okay, that's your agreement. That's not the VA's --

VETERAN: Well if that's the case there's a whole lot of litigation going on here that's not -- that was not signed by Secretary McDonough.

JUDGE: Well, again --

VETERAN: He has people he --

JUDGE: -- I can't give you an answer right now because --

VETERAN: I know you can't.

JUDGE: -- I can't -- I haven't looked at the --

VETERAN: You asked me if I -- if I got an authorization or somebody sent something. I just read it to you.

JUDGE: But --

VETERAN: They authorized the cost, not the size because they had no authority to litigate the size.

JUDGE: Well, okay, but maybe the cost could only get you a 20 x 15 greenhouse based on bids.

VETERAN: No, the law is explicit on that. 21.160 -- I don't have the --

JUDGE: I do.

VETERAN: Okay. It says it will provide whatever is necessary to accomplish the maximization of everyday living.

JUDGE: And apparently somebody decided that that would accomplish it.

VETERAN: But they have to inform me of the decision. There has to be -- I don't care about reasons and bases, I'm just asking for a, no, you don't get a 20 x 28. Throw that in the trashcan Mr. Graham, we made a mistake. There's some mistake here. They convinced me that they had authorized a 20 x 28 and they submitted costs for a 15 x 20 to the Director of Veterans -- VR&E in Washington. They did not submit a request for a 20 x 28 and financial consideration and approval --

JUDGE: Okay.

VETERAN: -- costs, they didn't.

JUDGE: Okay. And you have explained to me essentially why you believe that you are an eligible Veteran whose ability to function independently is so limited by the severity of your disability that the size of the greenhouse that they are proposing isn't big enough. But here's my thing. Because this isn't about want, it's about need don't you think that if you provide medical records showing why you need it that that would support your claim?

VETERAN: That's all a matter of record. It was a matter of record before the first VVA decision before Clementi, Your Honor.

JUDGE: And things have changed since then.

VETERAN: It's gotten worse. I have a bum heart and six ventral hernias.

JUDGE: Okay, but why do you think that you are going to have to lift 50 pounds?

VETERAN: I'm hoping I won't.

JUDGE: And I'm still not clear on why the size of the greenhouse --

VETERAN: A 15 x 20 will not incorporate a hydroponic setup, Your Honor, and if I can't --

JUDGE: But you aren't approved for a hydroponic setup.

VETERAN: 21.98 Your Honor we're allowed to change the plan as -- as things develop. If circumstances change, you can modify the plan during the pendency of the grant.

JUDGE: But it's -- but you don't get to make the final decision.

VETERAN: No, I never --

JUDGE: You get to make a proposal.

VETERAN: I never insinuated that I was --

JUDGE: And --

VETERAN: -- chief cook and bottle washer in this thing.

JUDGE: Well and the --

VETERAN: I'm asking for -- to be a stakeholder and have some say, some discussion rather than somebody arriving with a fait accompli, like a *Colvin* violation almost and say we're going to make this decision on how big your greenhouse is going to be and all you have to do is sign right here and say you agree with it. That's not a mutually arrived at decision among all the parties involved. That's somebody telling me what I am going to get.

JUDGE: But you haven't provided the evidence to show the justification for the larger greenhouse. That you haven't done.

VETERAN: I have 90 days to do that if you will grant me that.

JUDGE: Of course.

VETERAN: Well I see guys getting zinged about 48 days into it before they can even get the stuff in.

JUDGE: No you can have 90 days if you would like. We're in legacy. It's not AMA. So --

VETERAN: All right, I will assemble all my --

JUDGE: Actually we are in AMA so you automatically get 90 days.

VETERAN: Okay.

JUDGE: Because you opted in.

VETERAN: I'd like to make sure I do.

JUDGE: You opted in from an SSOC.

VETERAN: Yes, I did.

JUDGE: So you get 90 days. We are not in legacy.

VETERAN: Okay, I -- I can't argue with you because it's obvious that we have a difference of opinion here Your Honor.

JUDGE: Well let me just make clear that anything that you submitted that's evidence, and you should know this since you are a claims agent, after the decision that you appealed is going to need to be resubmitted within the next 90 days because we are in AMA, or else I can't consider it.

VETERAN: I understand all of that, Your Honor.

JUDGE: Okay, good.

VETERAN: Well in lieu of this I don't think there's any necessary -- I would ask that I be allowed to admit his testimony, but it's a little bit counterproductive I think under the circumstances of your legal position right now or your philosophy about how this works.

JUDGE: Well, again, this is a very narrow issue that I have to decide. And I don't know what the record shows yet so I can't -- I can't give you an answer on, well, they promised you this but they did this because I can't do that right now because I haven't thoroughly looked at the file and you deserve that.

VETERAN: I'm not asking for a decision today obviously. We don't even have a hearing

transcript --

JUDGE: Right but --

VETERAN: -- transcribed.

JUDGE: -- I mean, you know, you deserve to know why they gave -- decided that they could only provide you with the 20 x 15. You deserve to have notice of that.

VETERAN: I think the appeal is still pending personally because they haven't given me any denial of a 20 x 28. They promised it to me. They proposed it. They signed an agreement with me to provide that and they did not provide it. And instead they are proffering something far smaller with far less accessories associated with it.

JUDGE: And I think it's because there was a determination that the additional size and the additional requests weren't justifiable.

VETERAN: Right but that still requires a rating decision of sorts, a decision letter, something in writing that says Mr. Graham we changed our mind, we're not giving you a 20 x 28, we're giving you a 10 x 15 or a 15 x 20 and here's why, reasons and bases, something at least that you can --

JUDGE: Yes I think you have the right to know why.

VETERAN: This is an implicit denial, as near as I can tell --

JUDGE: Well I don't know about that.

VETERAN: It meets all the *Cogburn* elements.

JUDGE: But if you think that that could be somewhere buried in the voc rehab file I don't have, then I'll get it.

VETERAN: They never provided it for me and the SOC does not discuss it whatsoever.

JUDGE: Then I will --

VETERAN: It's -- it's like it never happened.

JUDGE: Then I will do my best to get the voc rehab file.

VETERAN: Okay, then I would expect somewhere in that SOC that it would say something to the effect.

JUDGE: I can't speak for the Aoj.

VETERAN: Well I can't speak for anything anymore because nothing seems to be firm or concrete. That's why I brought it to you in hopes that somebody can litigate this thing and unravel it because --

JUDGE: Well --

VETERAN: -- it feels extremely like an excessive awards program haircut from 20 x 28 down to 15 x 20 is a dramatic decrease in square footage and the accessories. And there's no explanation for it, no denial, no nothing.

JUDGE: Well, and again, I will try to find out why.

VETERAN: In the immortal words, I can't remember which movie it was, but I think it was "Superman" where Gene Hackman said promises were made and gifts were exchanged. And that's where I feel we're at right now Your Honor as that's where I was.

JUDGE: And I -- and, you know, the legal question is was the original proposal with the 20 x 28 a binding document? And I venture to guess that it's not. But I don't know. I just don't.

VETERAN: I don't either. That's -- that's why I'm before you.

JUDGE: But I'll find out.

VETERAN: I would be very appreciative if you can unravel this because --

JUDGE: And, again, I think really what it comes down to is what VR&E services believes will make you maximize your independence. And you were maximized, as far as I can tell.

VETERAN: I haven't been rehabilitated by their standards. I still do not have the greenhouse which would maximize my entitlement to -- or my ability to engage in everyday living. I still haven't reached that plateau yet. We are still in the waiting room for the greenhouse of any size.

JUDGE: Well it's -- I guess what's in dispute is what your needs are at this point under the program.

VETERAN: I dispute -- I dispute what I was promised versus what I was offered.

JUDGE: And I get it.

VETERAN: That's all I can ask for, Your Honor, no more, no less.

JUDGE: And I appreciate you -- your candidness and I'm glad we have an understanding with respect to that. And hopefully I can find your answer.

VETERAN: Well that's what I was going to throw *Bryant vs. Shinseki* in there and it's like what am I missing? Could you supply the missing --

JUDGE: Well I told you this is a justification issue and, as far as I can tell, they think that where they would put the greenhouse is close enough to your home that you wouldn't need -- that it's not necessary for you to have a toilet in the greenhouse and that whatever else you said you needed they determined it wasn't justifiable. So you need to justify it.

VETERAN: They agreed to give me -- in the proposal they agreed to give me the toilet and a two-year subscription to the NVLSP --

JUDGE: Okay --

VETERAN: --VVM.

JUDGE: -- but clearly that agreement wasn't binding.

VETERAN: It never came to a position of being provided, Your Honor. As I said, it's still in that netherworld, that limbo of take the 15 x 20 or go home and we're not going to talk anymore. I'm legally allowed to appeal it --

JUDGE: Of course you are.

VETERAN: -- in the interim because of my incontinence which is a product of having a much, much shorter bowel now. I had to put in my own bathroom at my own expense, a toilet, close to the gardening area where the greenhouse hopefully will be erected someday at my own expense.

And likewise I went out and purchased all my own VVMs to study to take the test to become accredited.

JUDGE: So you think that VA should have paid for all of that?

VETERAN: It was -- it was something that involved a maximizing of my everyday living.

JUDGE: Okay.

VETERAN: The toilet to me became part of the greenhouse as inextricably intertwined like *Harris vs. Derwinski*.

JUDGE: Okay but --

VETERAN: I would be running back and forth to a toilet --

JUDGE: Okay.

VETERAN: -- every 30 minutes.

JUDGE: I'm going to go back again. Why do you feel you're entitled to the benefits in this program?

VETERAN: Because I'm severely disabled Your Honor.

JUDGE: There's no question you're severely disabled. You have 100% rating.

VETERAN: Oh, irrespective of the 100% rating, 21.160 says it's -- maybe it's 31.20 says service connected as well as non-service connected --

JUDGE: But --

VETERAN: -- disabilities.

JUDGE: -- the point of the program is to provide you independence, and you seem to have plenty of independence. You don't have to use a device to put a sock on. I mean we're talking about basic needs to survive.

VETERAN: Those again are SAH accoutrements, Your Honor. It has nothing to do with the IL program. If you go back and study the history of the IL program --

JUDGE: So you are saying that the program is --

VETERAN: It's been perverted, Your Honor. IL program as it stands right now doesn't exist.

JUDGE: Okay, so but why -- maybe what you are saying is even though you're independent in your living the way the legal framework is you're still entitled to the program under a legal framework. And my problem with that is it's really hard for me to justify when I don't really think you meet the criteria.

VETERAN: That's --

JUDGE: So that's where I am right now and I know that that is not the issue before me.

VETERAN: I believe that's a *Colvin* violation.

JUDGE: But I'm telling you -- I'm telling you -- no a *Colvin* violation has to do with medical.

VETERAN: That's right.

JUDGE: And this is not a medical thing.

VETERAN: Well you're saying --

JUDGE: This is not a medical thing.

VETERAN: -- if you look at me and you're saying I don't think you're disabled.

JUDGE: No, I'm not saying I don't think you're disabled. I don't think you meet the criteria for the independent services.

VETERAN: Well the medical documentation will disagree with you.

JUDGE: I know you're disabled. You've made that quite clear. It's clear from your rating. That's not -- that's not at issue.

VETERAN: That doesn't reflect everything, Your Honor. As I said it includes non -- non-service connected.

JUDGE: Well then provide evidence of it to justify why you need the larger greenhouse.

VETERAN: My back condition is very well documented as well as my porphyria. It's in the VA file.

JUDGE: And again if you think that by providing evidence to show that you have non-service connected disabilities that are also very severe that aren't reflected in the file that help justify the need for these services --

VETERAN: Um-hum.

JUDGE: -- then by all means provide the evidence. I mean this is about justification. This is about want versus need. And they have decided that's what you need 15 x 20. And you are concerned about the fact that you were promised one thing and then later told you're getting another with no explanation. So in my opinion the explanation is we have decided these are your needs and they don't justify a larger greenhouse.

VETERAN: Well it's an in-camera decision that I was not a party to.

JUDGE: Well and -- and, again, that's the *Bryant* situation here. I'm telling you what you need to substantiate your claim.

VETERAN: Um-hum.

JUDGE: And -- and they have decided that you haven't justified the need under the program, so that is what you need to do to substantiate your claim.

VETERAN: Well again, as I said, I disagree inasmuch as that was a decision was proposed and signed agreeing to provide the 20 x 28.

JUDGE: And I don't know if that was binding.

VETERAN: And I don't have a 20 x 28.

JUDGE: Well you don't have anything because --

VETERAN: I --

JUDGE: -- this is all --

VETERAN: Because I objected.

JUDGE: Right.

VETERAN: But I objected to the failure to grant what was promised.

JUDGE: Right and those are two different things. One is you believe that there was a breach of contract and you were promised one thing and you were given another with no explanation. But then there's the decision that this is why it's not justified to give you the bigger greenhouse. And that was a decision and they explained it and said why you haven't justified it. So that's what you need to overcome.

VETERAN: Well I think at this stage, Your Honor, I am going to just go ahead and allow the evidence as -- as it stands right now to stand so if I take this up to the Court we can keep it clean because I believe I have demonstrated a need that you say that you don't think I have demonstrated or that I don't know longer qualify for.

JUDGE: Well it's the RO. I'm telling you what the RO said it's not justified, the larger greenhouse isn't justified.

VETERAN: They never said it was not justified. They --

JUDGE: Okay

VETERAN: They conceded a 20 x 28.

JUDGE: Right but then they later said it's not justified.

VETERAN: No.

JUDGE: And are you -- let me just ask --

VETERAN: There's no piece of paper in here that says you don't --

JUDGE: Okay, let me ask you this.

VETERAN: -- get one and it's not justified.

JUDGE: Do you believe that they changed their mind because the law changed in the middle of this appeal?

VETERAN: No.

JUDGE: No?

VETERAN: I'm not maintaining that at all.

JUDGE: Okay.

VETERAN: What I'm saying is that they promised me something, we agreed to it, everything was ironed out, everybody shook hands, and then there was a long pause --

JUDGE: But they still --

VETERAN: -- and a long silence.

JUDGE: It still has to be approved by somebody.

VETERAN: And then they sent it to VR&E financial approval of 15 x 20, not for financial

approval of a 20 x 28.

JUDGE: Okay. So at some -- some point --

VETERAN: There was a sub silentio decision made --

JUDGE: And you --

VETERAN: -- not to grant the --

JUDGE: And there's -- and you -- it's not on paper that you know of.

VETERAN: And it's nowhere in the record.

JUDGE: Okay.

VETERAN: Nowhere whatsoever.

JUDGE: Well we'll have to find out where it is.

VETERAN: I'd love to find it. I've tore my claims file apart. They refused to give me a copy of the CER.

JUDGE: Well and the thing is --

VETERAN: Well I shouldn't say they refused. They just never gave it.

JUDGE: Well and the thing is -- and -- and I think what's going to happen is I'm going to be able to find the decision and that's going to be the decision. And so in order to --

VETERAN: If you can find it I will withdraw it. I will take the 15 x 20 and shut up and go home.

JUDGE: Okay because I was going to say you can still appeal for the larger greenhouse, but if there's a reason and it's not justified and it's in there somewhere then that's --

VETERAN: If you can find it --

JUDGE: -- then that would be in my decision.

VETERAN: But I would normally be informed of this decision, would I not be, to allow me to --

JUDGE: I don't -- you know what? I'm not familiar enough with the VR&E program to be able to answer that question with confidence. So that's why I need to go back and look at the law very, very carefully.

VETERAN: I thought I was but I might not be but I've read all the regulations that I can find. I've poured over the old M28, the new M28-R and I can find -- everything says you will inform the Veteran of the decision. He did. I got a signed agreement with him in the regional office, in the VR&E offices on April 10<sup>th</sup>. He signed it right in front of me and we mutually agreed that it was a decision.

JUDGE: Right but I'm --

VETERAN: But I don't have a rating decision.

JUDGE: It sounds to me -- it sounds to me that you believed that the signed agreement between the two of you was binding. And -- and it clearly --

VETERAN: Well the document authorizes the purchase and assembly and installation of a 20 x 28. That's what the statement of work was for. There's nothing in this -- in the VBMS file for Alex Graham -- Gordon Graham rather that states we changed our mind, this is what you are going to get. There's nothing.

JUDGE: Okay.

VETERAN: There's absolute silence.

JUDGE: Well and I'm -- and I'm going to --

VETERAN: I guess you could call it --

JUDGE: -- look and see what I can find.

VETERAN: You would think there would have to be a decision with an implicit decision like *Cogburn* that you are supposed to presume that it was denied. But I don't even have the decision with an implicit denial.

JUDGE: Right but if -- if the regulations say that purchases of this magnitude must be approved by so and so --

VETERAN: I agree that -- I don't question the authority of them to question the dollar value of what they're signing off on. But he wasn't signing off on a 20 x 28. He was signing -- signing off on a 15 x 20. But nowhere in the -- in the record can you find a thing that says please approve a 20 x 28 for "X" number of dollars. That's not in there.

JUDGE: So they just all of a sudden turned around and said, okay, yeah I know we agreed on this, but this is what you are getting?

VETERAN: They didn't even do that. They said you get a 20 x 28. A year later they said take the 15 x 20 or leave it. And I said, well, when did it translate backwards?

JUDGE: Well and because this is -- because this type of program is --

VETERAN: If you can find it then I'll --

JUDGE: -- is a benefit that --

VETERAN: -- I will take it.

JUDGE: -- you know that is based on need --

VETERAN: Well, as I said --

JUDGE: -- you know what if they --

VETERAN: -- it hinges all on case law, not on my physical capabilities.

JUDGE: Yes, but if they determine that your needs are met by the smaller greenhouse that's your decision.

VETERAN: They did determine that and I argued that with them and then they said you're right Mr. Graham, we concede by the VVA decision and your disabilities that you're entitled to a 20 x 28 and we propose to build it for you. That's the proposal on October 12<sup>th</sup>. On -- six months later on April 10<sup>th</sup> they said okay we're all good to go 20 x 28 let's get the show on the road. I agreed with them totally. A year later I have a 15 x 20. And there's nothing in between, nothing anywhere that anyone could read as being a denial or a change of heart or a we reviewed your case file and determined you're not entitled to a 20 x 28. But how -- Veterans are -- how can I

appeal if I don't have anything to appeal from? All I have to appeal from was a 15 x 20, but that wasn't a 20 x 28.

JUDGE: Correct.

VETERAN: But there's nothing --

JUDGE: But there is something in there that says --

VETERAN: If you can find it --

JUDGE: -- the larger greenhouse isn't justifiable.

VETERAN: If you can find that I will -- I will -- I will --

JUDGE: Well I did find it. That's why I'm telling you --

VETERAN: You found it after -- almost a year after I objected to the 15 x 20 being substituted for the 20 x 28 Your Honor.

JUDGE: So your answer is it's not justified based on your needs.

VETERAN: But there has to be a decision that says you're not before I appeal -- before the SOC is written. You're looking at something after the SOC, almost a year after the SOC.

JUDGE: But --

VETERAN: I might be out of phase on that a little bit.

JUDGE: No I know because we're -- I don't know whether we are talking about before the Board decision or after the Board decision.

VETERAN: After the Board decision we negotiated and they said, oh, I guess we can give you a greenhouse, here's a 15 x 20. And I said, well, don't we all get to talk about it? No, here's your 15 x 20, take it or leave it. I can't lift more than 15 pounds. Okay, well, put some hydroponics in there. Gee, I'm incontinent. Could you put a porta potty in there? Yes, we will. Fine, everybody proceeds. And then they ask me to sign a blank agreement and I said no. They arrived on July 13<sup>th</sup>, 2016, that said here's the 15 x 20 take it or leave it. I said, no, I'm going to leave it and file a Notice of Disagreement. They did a 90-day review and said, no, it's still a 15 x 20. I said, okay, fine I'm going to file a Notice of Disagreement 958, go up the ladder to the Board. At that moment they stopped and they said, no, we're going to give you the 20 x 28. Never mind. That was October of '16, a year and a month after the BVA decision. The next spring we signed the --

JUDGE: But did the BVA decision just authorize the need for a greenhouse? Did it discuss parameters?

VETERAN: No it just said a heated -- I would have to look at the decision --

JUDGE: Yes and I will look at it too.

VETERAN: -- but it does say heated greenhouse. It didn't say hydroponics because at that point I don't know anything about growing hydroponically. I do know that I have the disability of being unable to lift these things because every time I do I get a brand new one of these hernias pop out. I have to wear a belt to hold them in. In spite of that I keep coming up with new hernias if I lift a 20 pound of dog food. So I got to the point where I can't lift anything like that. How I could use a 15 x 20 greenhouse that requires 50 pound bags of potting soil and lift them up I don't see it --

JUDGE: Okay.

VETERAN: -- happening. I --

JUDGE: But why would you --

VETERAN: So I objected.

JUDGE: But -- I know but I don't understand why the 50 pounds of soil is linked with a smaller greenhouse and not a bigger greenhouse.

VETERAN: The bigger greenhouse is a hydroponically designed one with room for the hydroponic tanks. That's one reason why I brought him because he knows all about hydroponics because his father got a greenhouse on VR&E in 2010 after a five-year fight. He went to Congress and testified in Congress and the director of VR&E said, oh, dear me, well, we're going to give you a greenhouse. Please don't go to Congress again. I'm before you and was before Judge Clementi for the same reason. They just arbitrarily denied with no reasons or bases. And when I objected all of a sudden, oh, well, we'll give you a bigger greenhouse.

JUDGE: Okay.

VETERAN: They agreed to it.

JUDGE: I think we've beat this dead horse.

VETERAN: Yeah, we've hashed it.

JUDGE: We don't need to --

VETERAN: We've shot that horse.

JUDGE: Yes I mean I know you know that I --

VETERAN: Thank you.

JUDGE: -- know what's going on. So --

VETERAN: If you read my legal brief you will see the --

JUDGE: I will read your legal brief.

VETERAN: -- historical perspective of it. I will leave it with Thomas out there --

JUDGE: That would be great.

VETERAN: -- so that we can get it into the record.

JUDGE: That would be great.

VETERAN: I have several photographs here that show you the intensity of my disability and I'm sure you will be able to see this. I can bend it outwards --

JUDGE: I don't --

VETERAN: -- from my flesh.

JUDGE: I don't want to see.

VETERAN: That's my defibrillator --

JUDGE: I don't want to see it.

VETERAN: -- and pacemaker in my chest now from the porphyria. It's a ferritin level. Every phlebotomy I get reduces my ferritin level. When you get down to 4% --

JUDGE: Well if you're this disabled then how can you --

VETERAN: How can I write a legal brief?

JUDGE: No, how can you grow crops?

VETERAN: I have help, minimal help from my wife. My son comes over to help me. My daughter-in-law comes over to help me. Everybody helps me maximize my growing capabilities, Your Honor.

JUDGE: Okay. All right, well, we've gone way over. We are at the two-hour mark here, so let's --

VETERAN: I apologize.

JUDGE: -- let's -- well it was an important topic and I wanted to hear what you had to say. So I appreciate the time.

And we are going to go ahead and close this hearing, unless there's anything else you think I need to know before we sign off.

VETERAN: I have nothing further to add, Your Honor.

JUDGE: Okay, well, thank you very much, sir, for your service. And I really do appreciate your time.

VETERAN: Thank you for your time, Your Honor. I've waited a long, long time.

(HEARING ADJOURNED)