Submission of Documents to Department Of Veterans Affairs

Board Of Veterans Appeals
Litigation & Support Division
P.O. Box 27063
Washington, D.C 20038

FAX: (844) 678-8979 or (202) 6324628

Veteran: Graham, Gordon A.	**VSC:** VBASEAT346
C-File or SSN: CSS [redacted]	
Street Address: 14910 125th St. NW	
City, State, Zip: Gig Harbor, WA 98329	

Date: 9/09/2019	**ATTN:** The Honorable Jaime Areizaga-Soto

From: **Gordon A. Graham**	**Exclusive Contact Requested**
Title: Nonattorney Practitioner VA #39029 POA Code E1P	
Address 14910 125th Street KP North	
City, State Gig Harbor, WA 98329	
Tel: (253)-313- 5377	**Fax (253) 590-0265**
Email: **gagraham51@gmail.com**	

Type of Document Submitted:

☐	Request for Board Hearing at VA Central Office in D.C.
☐	Request for Advancement of the Docket (Rule 900)
☐	Request for Copy of Hearing Transcript
☐	Submission of New and Relevant Evidence associated with the instant Appeal
☐	VAF 10182 NOTICE OF DISAGREEMENT (BVA Review)
☐	Motion for Reconsideration (MFR)
☒	Other Request for Recusal of Veterans Law Judge Lauren B. Cryan from BVA Docket No. 190909-55963

Number of Pages Submitted (NOT including this cover sheet):	Ten (10) Pages

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Gordon A. Graham #39029
14910 125th St. NW
Gig Harbor, WA 98329
(253) 313-5377

The Honorable Jaime Areizaga-Soto
Chairman (01)
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

September 9, 2023

Re: Graham, Gordon A. CSS [redacted]
Appearing *pro se*
Re: BVA Docket No. 190909-55963

Motion to Recuse

Dear Mister Chairman,

Gordon A. Graham, appearing *pro se*, hereby seeks recusal of Veterans Law Judge Lauren B. Cryan under the provisions of 38 USC §455, 38 USC §7102 and 38 CFR §§20.705(b)(4); 4.23. All dates listed are VBMS Receipt Dates unless otherwise identified.

For the reasons outlined below, the Appellant respectfully submits that Veterans Law Judge Cryan has not been impartial in conducting the July 12, 2023, Central Office Hearing and adjudicating the issue of entitlement to a

larger greenhouse. Inexplicably, The Trier of Fact exhibits a personal bias or prejudice against him, such that she should be removed from this appeal. He believes the Hearing Transcript more than supports his contention.

Veterans Law Judge Cryan repeatedly failed to properly identify the contention on appeal, and failed to grasp the correct case law applicable to Appellant's case. She consistently called into question Appellant's competency and credibility-apparently based solely on his ability to attend a hearing in person... in Washington, D.C.. ***Buchanan v. Nicholson***, 451 F.3d 1331, 1334-37 (Fed. Cir. 2006).

Veterans Law Judge Cryan, during her pre-hearing colloquy, began by stating what she, personally, perceived were the two matters on appeal-i.e., a) Appellant's continued entitlement to rehabilitation under the Independent Living Program, and; b) the size of the greenhouse. After being sworn in, the same concerns having nothing to do with the claim on appeal, were voiced repeatedly on the record. By way of visual observation, The Judge made a determination medical in nature and concluded Appellant was not sufficiently "disabled" such that he could (or still should) qualify for the Independent Living Program's strictures-all prior to any testimony being taken. ***Colvin v. Derwinski***, 1 Vet.App. 171, 175 (1991) (While the Board is not required to accept the medical authority supporting a claim, it must provide its reasons for rejecting such evidence and, more importantly, must provide a medical basis other than its own unsubstantiated conclusions to support its ultimate decision.) Nevertheless, the ensuing seventy six -page hearing transcript successfully captured essentially the same elements showing a marked prejudice toward the Veteran. See VBMS entry 'Document Type' Hearing Transcript with 'Receipt Date' of July 12, 2023. 'Document ID' 2EFB765F-0469-4704-AO17-C673F4A12FBC

The Judge's unfamiliarity with the actual claim on appeal, her non-existent grasp of Vocational Rehabilitation and Education (VR&E) case law under 38 USC Chapter §3120, her misconception of the Statute and its avowed advocational purpose with regard to the Independent Living Program, and

attempting to ignore the law of the case made the hearing adversarial in violation of law.

Procedural Background

This matter was previously before the Board. See BVA decision No 13-09 654A, decided on September 4, 2015, VLJ Clementi presiding.

The appeal currently pending before the Board of Veterans' Appeals is the issue of entitlement to a specific size of greenhouse only. A determination that the Veteran was severely handicapped was accomplished in 2011. In 2016, another assessment confirmed the Veteran was still severely disabled and noted the static nature and permanence of his numerous disabilities and photosensitivity. The new 2016 determination confirmed the previous finding of fact that the Veteran's disabilities, both service and nonservice connected, had created a serious employment handicap such that the achievement of a vocational goal currently was not reasonably feasible.

In approximately March 2016, the construction supervisor assigned to the project announced a winning bid for a 15'X20' greenhouse. The assigned Vocational Rehabilitation Counselor presented this pre-determined proposal to the Veteran in violation of §21.92(a)(b). The Veteran, as permitted by regulation, politely declined to accept it.

On July 14, 2016, after being offered the same size yet again, the Veteran declined and lawfully requested an Administrative Review under §21.98(a)(1) (2016) of the decision to award a pre-ordained size (15'X20') as a *fait accompli* in violation of §§21.92(a).

On October 14, 2016, the last day permissible under §21.98(b)(2)(2016) a mutually arrived-at size of 20' X 28' with hydroponics, heat and ADA accessible

features with a concrete floor with padding was mutually arrived at. Construction bids were sent out and preliminary permissions were completed. There was no confusion or misconstrual regarding the size offered. A subsequent letter sent to the Veteran's Congressman can confirm the Veteran's credibility. See VBMS Document Type 'Congressionals' with 'Receipt Date' of October 25, 2016.

On April 10, 2017, the Veteran and his Veterans Rehabilitation Counselor caused to be consummated the October 2016 agreement for a 20'X 28' ADA compliant greenhouse with an agreed list of accessories in person.

On August 2, 2017, the VR&E Officer avers under oath that he conducted a conference call with Director, VR&E Services and the Seattle Regional Director regarding the size of greenhouse. (Not found in the VBMS or the CER files of record). This *in camera* conference mutually concurred in arbitrarily usurping authority and reducing the size of the greenhouse and its appurtenant accessories without the Veteran's participation, concurrence or knowledge.

On August 7, 2017, the VR&E Office, undersigned by the Seattle, WA Regional Office Director, caused to be submitted a request for financial approval **only** of a 15'X 20' greenhouse without the mutual concurrence of the Veteran' s Rehabilitation Officer and the Veteran. Nowhere in the four corners of the correspondence was there mention of the prior agreement. **MOPH v. Sec'y of Veterans Affairs**, 580 F.3d 1293 (Fed. Cir. 2009); ***MacKlem v. Shinseki***, 446 Fed. Appx. 310 (Fed. Cir. Jan. 11, 2012).

On November 21, 2017, the SOC dated September 11, 2019, page 7, avers "VR&E Services formally approves ***Mr. Graham's Construction Request*** for a 15'X20' ADA Compliant Greenhouse..." (Appellant's Construction Request not found in VBMS or CER) (emphasis added to original). Appellant has stated under oath no such Construction Request was ever proposed or agreed to.

On September 21, 2018, the Veteran filed a VA Form 70-3288 requesting a copy of his Counseling/Evaluation/Rehabilitation (CER) folder from VA. To date, five years later, the request has not been honored and remains pending. Fortunately, Appellant gained access to VBMS in 2018 and discovered the sparse evidence of record in the VBMS efolder in no way comports with the fiction put forth in the Statement of the Case (SOC) dated September 11, 2019.

On September 11, 2019, the Seattle VR&E Officer issued the SOC. A summary of the Evidence begins on page 2 of 19 but does not comport with the facts as they were known regarding the proposed size offered of the greenhouse. The last entry on page 6 is July 27, 2016. The next entry on page 7 begins a year later on 8/02/2017 and ignores the evidence of record showing the VRC's October 2016 proposal that they ***will*** supply a 20'X28' size in VBMS and the CER.

Recusal Issues

To begin with, there simply is no entitlement issue on appeal before the Law Judge other than the disagreement with the physical size of the greenhouse. Appellant has been granted entitlement under the IL Program. That is a positive finding of fact and may not be disturbed. See ***Medrano v. Shinseki,*** 332 F. App'x 625 (Fed. Cir. 2009). The Veterans Law judge seems to suffer from the impression the Appellant has already been given a greenhouse and was greedily begging for a larger one. On the contrary, Appellant has patiently sought and appealed this matter since March 20, 2011. There is, and always has been, only one claims stream continuously prosecuted.

The Veterans Law Judge confuses two entirely different facets of 38 USC Chapter 31. VR&E offers two separate programs. Appellant does not seek vocational rehabilitation to gain employment. Appellant has been found to be eligible for the Independent Living Program under §3120. It is immaterial that he has overcome incredible medical obstacles to help Veterans on a limited basis. However, the enormity of the disabilities, both service and nonservice

connected, still make him severely incapable of the achievement of a true vocational goal that comports with his prior occupation. But again, that is immaterial. At best, Appellant is capable of helping Veterans from October to June of every year in a substantially sheltered, temperate environment above 40 degrees Fahrenheit. In the remaining period from June to October, he is precluded from excessive exposure to sunlight due to his photosensitivity requiring debilitating monthly phlebotomies. This was all documented prior to the previous BVA decision and a medical matter of record. In the immortal words of Judge Michael Allen in these circumstances "That ship has sailed."

The law of the case covers this contingency. The Veterans Law Judge's seeming unfamiliarity with this bedrock canon of law and her statement at the beginning of the hearing that the matter of continued entitlement to the ILP program is also on appeal is disturbing. Nowhere in the four corners of the current appeal can it be discerned that Appellant's entitlement to the very program itself is on appeal. If the Trier of Fact were to sincerely believe this to be true, the correct AMA procedure would be to refer it back to the Agency of Jurisdiction (AOJ) to ascertain if the entitlement to the IL Program was obtained by an act of omission or commission on the Veteran's part in the first instance.

The Board is bound by previous decisions as to the specific case decided. 38 C.F.R. §20.1303 (2023). This rule essentially codifies the law of the case doctrine, which "preclude[s] reconsideration of identical issues" when a "case is addressed by an appellate court, remanded, [and] returned to the appellate court." ***Johnson v. Brown,*** 7 Vet.App. 25, 26 (1994). The present Trier of Fact is therefore precluded from re-weighing evidence which has already been weighed to reach a different factual conclusion as to the finding of fact that the Veteran has severe medical conditions such that the achievement of a vocational goal currently was not reasonably feasible.

Appellant's ability to travel on a commercial airliner cross-country to attend his hearing is not some superhuman feat capable of accomplishment by only the most fit. The trip did not involve excessive exposure to the sun and the mean temperature was well over 40 degrees. Appellant sought a ride share

application to transport him to and fro from the airport as well as to his hearing. Appellant has rollaway wheels on his travel suitcase and doesn't have to lift it. As none of his gardening disabilities are in play, it might appear that the Veteran is indeed free of disease or injury. But that is not on appeal.

The Veterans Law judge avers there was a meeting with VR&E personnel to decide the size and Appellant didn't attend. The evidence of record doesn't support her reading of it. The limited evidence of record shows Appellant met faithfully with his VRC and was fully compliant with the IL Program at all times. At no time did he fail to comply until it became obvious in late 2018 there could be no mutual consensus. At that time, by operation of law, he requested issuance of a SOC as required to initiate his substantive appeal.

The Veterans Law Judge, documented numerous times by the hearing transcript, shows she is not even aware of the disabilities the Veteran suffers which are in play here. In fact, on page 4 of the transcript, she insists the Veteran is rated 100% schedular only for Hepatitis C and not Porphyria in spite of the evidence of record clearly and unmistakably showing otherwise. The 100% rating for Porphyria has an effective date of March 30,1994. It is protected under §3.951(b) (2023).

Completely ignoring the history of the claim, the Veterans Law Judge does not seem capable of grasping the thirteen-year timeline of events. The Veteran's addiction as an inpatient had no bearing on granting of entitlement to ILP services. Appellant was granted entitlement to the greenhouse on appeal several years later at a time when he had successfully overcome the medically induced addiction.

Nevertheless, Judge Cryan spent almost the entire hearing focusing on Appellant's self-alleged disabilities contradicted by his otherwise seemingly healthy medical appearance, was unaware of the protected 100% schedular award for porphyria cutanea tarda and baldly averred she had the authority to

rescind the prior Board decision granting entitlement to the greenhouse. At the bottom of page 5, the Veterans Law Judge states , *in haec verba*,

"But I am not seeing how you are still entitled to the benefits based on your standard of living. I mean this isn't a program to maximize independent living if you are already independently living."

On page 9, the Judge alleges she has not looked at the case law applicable. Confusingly, several minutes earlier, on page 8, the Veterans Law Judge alleges she *has* reviewed the file and concedes a conclusion of law exists regarding the greenhouse entitlement.

On page 7, the Veterans Law Judge appears to conflate remuneration at the 100% rate via Veterans Compensation benefits as somehow equal to, or, in the alternative, sufficing to supplant any entitlements under §3120. Further down page 7, the Veterans Law Judge makes decisions medical in nature, unsupported by anything other than subjective conjecture, stating

"And if you can live independently and you can represent other clients that means you 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."

Sadly, the above diatribe fails to address how representing Veterans, in person or remotely, has any possible bearing on rehabilitating the Veteran in his gardening pursuits to achieve maximum independence in daily living outdoors safely. This fixation on the Appellant's ability to travel independently overwhelms any potential hope of objectivity or impartiality on her part. Perhaps worse is the misguided belief that she is empowered to rescind a prior, favorable BVA decision in violation of Medrano precedence based solely on her perception of the visual appearance of the Veteran.

The list of *faux pas* continues on succeeding pages too numerous to cite. In spite of empirical evidence constructively in the Secretary's possession

regarding the extreme underutilization of such a valuable, rare entitlement (ILP), the Veterans Law Judge attempts to shame the Veteran for "stealing benefits from those more disabled-e.g., the homeless". Homeless Veterans do not qualify for ILP as they have no domicile in which to maximize their ability to accomplish the activities of daily living.

On page 14, the Veterans law judge appears to be unaware of the concept of a 20-year protected rating and insinuates anyone who is "cured" of Hepatitis C is no longer entitled to the benefit. Part IV of the Secretary's VA Schedule of Disabilities (VASRD) §4.114 DC 7354 rates Hepatitis C on its residuals based on serologic evidence of infection- without regard to whether it is an active or resolved infection. This inability to grasp simple concepts of VA statutes and regulations, irrespective of her comprehension of VR&E law, renders the Veterans Law Judge incapable of being an independent Trier of Fact.

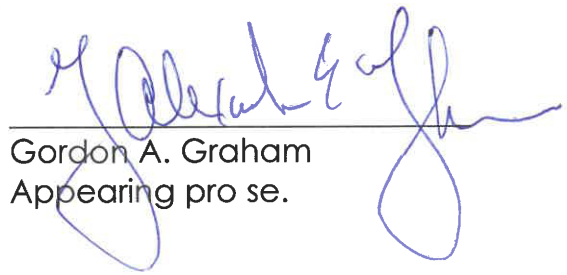
Rule 705 (§20.705(b)(4) Duties requires that the Veterans Law Judge who conducts a hearing must ensure the course of the Board hearing remains relevant to the issue or issues on appeal. However, the evidentiary record in this case demonstrates that the Veterans Law Judge chose to disregard this regulation.

28 U.S.C. §455(a) provides that any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Section 455(b)(1) states that a judge shall also disqualify himself or herself where he or she has a personal bias or prejudice concerning a party. In ***Liljeberg v. Health Services Corp***., 486 U.S. 847, 861 (1988), the U.S. Supreme Court held that a judge should recuse himself if "an objective observer would have questioned his or her impartiality." See also ***Aronson v. Brown***, 7 Vet. App. 153, 157 (1994) (a judge should recuse himself where a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality). It is not sufficient for a party to feel a judge is unfair or not impartial. "The cause of apparent partiality must almost always be from an 'extrajudicial source.'" ***Higgins v. Brown,*** 7 Vet. App. 389, 392 (1995) (quoting ***Liteky v. United States***, 510 U.S. 540, 555 (1994)).

The time-honored pro-Veteran canon of statutory construction most recently espoused in ***Henderson v. Shinseki,*** 562 U.S. 428,441 (2011) held "We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.". The Supreme Court first articulated this canon in ***Boone v. Lightner*** to reflect the sound policy that we must "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. 561, 575 (1943). This same policy underlies the entire veterans benefit scheme. Appellant eagerly awaits a nonadversarial, Veteran friendly adjudication of his appeal before an impartial Trier of Fact.

Thus, for the reasons enumerated above, as well as the marked, blatant adversarial conduct of the Veterans Law Judge, the pro se appellant requests recusal of Veterans Law Judge Lauren B. Cryan and a new hearing before an impartial Trier of Fact.

Respectfully submitted,



Gordon A. Graham
Appearing pro se.