Form 9

SUBSTANTIVE APPEAL

This document will substitute as my Form 9 Substantive Appeal to the Board of Veterans Appeals. I desire a hearing. For the following reasons, I feel the VA has incorrectly decided my request for a greenhouse under the Independent Living Program:

-The VA has determined I “own” a greenhouse. I do not.

-The VA has provided me with an Independent Living Assessment that is incorrect. The borrowed greenhouse is not ADA-compliant.

-The VA has determined I currently have “one large and at least two smaller greenhouses” on my property. I do not.

-The VA has determined I am requesting an additional greenhouse for “avocational pursuits”. I am not.

-The VA has failed to rebut the impact of severe disease/injury or medical need for protection from cold/sun.

-The VA has determined that I desire to grow vegetables solely in order to avoid purchasing them. I do not.

-The VA contends I grow flowers in my borrowed greenhouse. I do not.
The VA has determined I am involved in helping other Veterans for vocational purposes. I am not. VA currently classifies this as an avocational pastime or “hobby” covered by 38 USC 3103(d).

The VA has characterized my greenhouse request as avocational and therefore not authorized. This is in direct conflict with VA General Counsel Opinion 34-1997. For the record, the following, while not precedential, illuminates the above Precedent Opinion and provides current legal thinking.

http://www.va.gov/vetapp11/Files1/1109753.txt

The following discussion will illuminate the error of each of the above contentions and serve as my rebuttal. I will include new and material evidence in this submission to buttress my contentions.

**INCORRECT INDEPENDENT LIVING ASSESSMENT**

On August 2nd, 2011 the vocational counselor visited and surveyed the living and gardening conditions. Goals of Independent Living were discussed. No plan was formulated jointly at that time. The eventual assessment was not a mutual one. It simply represents the subjective opinion of the counselor. He approaches his duty from a strictly clinical viewpoint based on a set of parameters read from the M-28 manual. His knowledge of gardening is little or none. **Decisions on the suitability of any all-weather gardening structures on site was limited by the counselor’s unfamiliarity with normal gardening practices.**

The decision to deny the greenhouse was not based on valid information at the time. **The current (borrowed) greenhouse was/is not ADA-compliant.** Therefore the decision was flawed from the outset. Continued discussion on this at several later interviews and inspections on site failed to bring any resolution. The ability to grow during cold winter months was brought up repeatedly but was never addressed. **No resolution to the non-ADA compliance of the borrowed greenhouse has ever been discussed since it was identified.**
When an IL program is initiated, it involves both parties reaching mutually agreed upon definitions and goals (see 38 CFR §21.362(b)(2)). Simply paying lip service to a Veteran by issuing a denial is not mutually inclusive. A counselor fails if all he brings to the table is what will not be forthcoming. Any discussion of goals must involve both parties. In the counselor’s interpretation, there is no such thing as “vocational gardening”. At no time have I heard a discussion about what I hope to gain by gardening in winter and my needs based on the necessary and vital language.

**38 CFR §21.92 (b) Approval of the plan.**

The terms and conditions of the plan must be approved and agreed to by the counseling psychologist, the vocational rehabilitation specialist, and the veteran.

§21.92 (b) demonstrates that the counselor, Mr. Boyd and I are all equal stakeholders in this endeavor. Allowance for a health maintenance program, environmental and other physical factors remain unaddressed and, as such, make the Statement of the Case a flawed document from the outset.

Simply informing the Veteran of the counselors’ decisions regarding the Individualized Independent Living Program does not include him in the process. Just because a counselor is unable to identify or justify a goal does not absolve him of the responsibility of investigating the request. Searching for common sense solutions that benefit the most severely injured Veterans among the VA population who qualify for the ILP is the reason for the program. A blatant denial with no further discussion does not engage all the stakeholders. It merely reflects the VA counselor’s subjective views on the subject and an inability (or unwillingness) to research other alternatives. Another pertinent regulation is 38 CFR § 21.362(a)(b)(2)(c)(3):

(a) **General.** The successful development and implementation of a program of rehabilitation services require the full and effective participation of the veteran in the rehabilitation process.

(b) **VA responsibility.** VA shall make a reasonable effort to inform the veteran and assure his or her understanding of:
(2) Other services which VR&E staff can assist the veteran in securing through non-VA programs; and

(c) Veteran’s responsibility. A veteran requesting or being provided services under Chapter 31 must:
(3) Seek the assistance of VA staff, as necessary, to resolve problems which affect attainment of the goals of the rehabilitation plan;

I have had numerous conversations, in person, via telephone and by email on the feasibility of my having a heated, ADA accessible greenhouse of my own that encompasses my medical issues. Each and every conversation started off with the premise that the greenhouse, as well as the garden, was characterized as a hobby and ineligible for ILP funding. This stance is in direct conflict with 38 CFR §21.90(a):

§ 21.90 Individualized independent living plan.

(a) Purpose. The purpose of the IILP is to identify the steps through which a veteran, whose disabilities are so severe that a vocational goal is not currently reasonably feasible, can become more independent in daily living within the family and community.

Obviously, dictating the terms of the IILP with no effort to identify the steps necessary to independence and self-actualization serves no purpose. A true IILP would include an investigation of what was available and not a redundant litany of what will never be considered. Put another way, stakeholders work together and identify positive areas to increase independence rather than identify all the reasons why it cannot be realized. It is incumbent on the counselor to be cognizant of the health of the Veteran he is evaluating. My disease/injury picture is not evident for the most part. In point of fact, the SOC fails to rebut my disagreement with the counselor’s assessment of my health and weight-lifting limits in the denial. Bare, conclusory opinions, unsupported by facts are not entitled to any deference when weighing the evidence.
My counselor has never done a detailed study of the garden during the inclement winter months when the need is greatest.

**OWNERSHIP OF GREENHOUSE**

The question of ownership never arose because there has never been a serious discussion about granting the request. I admit I was remiss in not informing the counselor that I do not own the structure. My wife purchased the greenhouse and a matching, smaller cold frame for my in-laws in 2005 as a gift. My father-in-law passed away in 2010. I use the greenhouse with the permission of my mother in-law. Regardless of when this information surfaced, it is now a matter of record and the error of assuming it was mine has been rectified. Thus, any decision based on the adequacy of “my” current greenhouse(s) is now invalid and makes the decision based on it void ab initio.

**SIZE AND NUMBER OF GREENHOUSES**

The decision states that I have one large and at least two smaller greenhouses on my property. This is untrue. First, to clarify what constitutes a “greenhouse”, let us defer once again to Miriam Webster for a more nuanced definition. Apparently there seems to be a misconception of what one consists of:

**Definition of GREENHOUSE**

a structure enclosed (as by glass) and used for the cultivation or protection of tender plants

VA has chosen to conflate the meaning of greenhouse to include a coldframe structure (unheated) and a raised planter bed covered with glass (unheated) which might be defined loosely as a hot bed when manure is present. I have taken down my temporary structure to protect last year’s tomatoes from rain. It was never enclosed or met any definition of “greenhouse” nor was it constructed to be employed as such.

To set the record straight, there is one greenhouse (borrowed) on site. There is one cold frame (borrowed) on site. There are two raised planter beds which could loosely be described as “hotbeds” when manure is present in them. One
is incapable of truly being enclosed so technically does not meet the definition “hotbed”. It can best be described as “a raised planter partially covered by glass”.

**REQUEST FOR ADDITIONAL GREENHOUSES**

The VA has characterized my ILP request as one for “additional greenhouses”. This is untrue. My sole objective was to obtain an ADA-compliant, heated structure capable of being entered and sitting down in. The subject has never been addressed and the SOC does not mention it. As for avocational pursuits, I can only defer to the clear meaning enunciated in 38 CFR §21.160:

§21.160(a) Purpose.

The purpose of independent living services is to assist eligible veterans whose ability to function independently in family, community, or employment is so limited by the severity of disability (service and nonservice-connected) that vocational or rehabilitation services need to be appreciably more extensive than for less disabled veterans.

(d) Services which may be authorized. The services which may be authorized as part of an IILP (Individualized Independent Living Plan) include:

(iv) Health maintenance programs;

The VA counselor continually insists on a strict interpretation of what the ILP constitutes. Hence, in his interpretation, anything that smacks of "avocational" is impermissible. As defined above, the ILP is permissible when utilizing services that include health maintenance programs. I submit that growing pesticide-free vegetables is part and parcel of a vocational desire to maintain the health of my liver or what is left of it. A health maintenance program can be administered in a setting such as a garden where the manufacture of the product occurs. In addition, physical exercise is another health maintenance benefit. Since I have
proved my ability to accomplish this in summer and the benefits are unarguable, a relaxed interpretation that is nonadversarial and benefits my needs is the correct interpretation. The VA is free to describe it as “avocational” in nature but that does not, in and of itself, make it an impermissible use of VA ILP funds. This finding cannot be sustained due to similar grants at other VA regional offices for the very same thing—touit: a greenhouse. Please see this link. http://www.wtoc.com/Global/story.asp?S=10758110

Each and every one of the greenhouses granted were for Veterans who actually have handicaps equal to or less than mine. Nevertheless, they were granted. I do realize that any grant at any VARO for this does not constitute a bright line rule or create precedence. My burden of legal proof does not need to rise to that level. I merely have to show that it is VA policy to grant in these circumstances more often than not. I have met that burden. Whether the other Veterans attained theirs for vocational or avocational purposes is merely semantics. My desire is fairly predicated on health needs rather than a hobby. The volume I produce every year and preserve or freeze is not what any would call a hobby.

Perhaps my argument for a greenhouse would have more success if I couched my request in a different vernacular and requested “vocational rehabilitation in the art of growing vegetables year-round indoors in a VA-approved vocational greenhouse setting where I can function more independently in the family and the community without the assistance of others or a reduced level of assistance of others.”

**FAILURE TO ASSESS ENVIRONMENTAL IMPACT OF DISEASE AND INJURIES**

There has been some discussion by the counselor that a grant can only take into account service connected disabilities when making a decision on an ILP grant. That misconception is dispelled by 38 CFR 21.160(a):

§ 21.160
Independent living services.
(a) Purpose. The purpose of independent living services is to assist eligible veterans whose ability to function independently in family, community, or employment is so limited by the severity of disability (service and nonservice-connected) that vocational or rehabilitation services need to be appreciably more extensive than for less disabled veterans.

This would be an excellent place for a discussion of 38 CFR §4.10 as well.

Furthermore, there is no discussion whatsoever of this subject in the Reasons and Bases for the denial. I clearly included it in my Notice of Disagreement. 38 CFR §19.29 specifies that any disagreement with a decision brought up in a NOD must be addressed in a SOC:

§ 19.29

Statement of the Case.

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

(a) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement;

(b) A summary of the applicable laws and regulations, with appropriate citations, and a discussion of how such laws and regulations affect the determination; and

(c) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed.

As further explained in Veterans Benefits Manual M28-1, Vocational Rehabilitation and Counseling Under Chapter 31, Part II, chapter 8.02e., “[t]he goal of an IL program is to increase the veteran’s options, resulting in an improved quality of life. Options may be limited by skill deficits or by physical, environmental, or psychological factors."

My environmental factors are my Porphyria Cutanea Tarda (sunlight) and cryoglobulinemia (Reynaud's phenomenon). The Independent Living Program is a vehicle for Veterans with no hope of vocational rehabilitation to engage in hobbies and avocational pursuits. That it may also encompass growing or
producing vegetables for consumption that are pesticide-free is much in keeping with the goal of a health maintenance program—especially when necessary and vital.

**GROWING VEGETABLES TO AVOID BUYING THEM**

The VA counselor has propounded the theory that I hope to avoid paying for vegetables by growing them. From the Reasons and Bases of the SOC:

“Mr. Gordon (sic) is requesting that VR&E provide services to supplement his current avocational activities for which he is independent in carrying out. He is desirous in (sic) growing his own vegetables so that he will no longer have to purchase them.”

I would quote my remarks from my NOD which were apparently overlooked. As these arguments are not addressed in the SOC, it appears only a cursory glance occurred or the contention was overlooked entirely. This is from pages 14 and 15 of my NOD:

I have discussed my physical limitations and the shortcomings of my growing endeavors out of doors in winter. I have also touched on the necessity of growing pesticide-free vegetables in prior correspondence. My liver is now in Stage 4, or, more precisely, in what is called “compensated cirrhosis”. This means that I will soon need a new liver. Due to my autoimmune disorder, my body will reject a transplant. Thus it behooves me to treat the liver I have with the utmost care to prolong my life. The ILP counselor informs me that this (growing pesticide-free vegetables) does not fall into the “necessary and vital” caveat of independence in daily living. Absent any intervention on my part, I will die much sooner if I continue to consume store-bought vegetables that are heavily laced with commercial pesticides. I would like to add here that a large part of my problems were caused by consuming another pesticide for two years in Southeast Asia called 2,4,5 T—also known as Agent Orange. The continued assault on my liver with chemicals hastens my demise. **Growing pesticide-free vegetables is necessary and vital to my living, let alone independence without the help, or reduced help of others.** Somehow that seems to have become lost in this discussion. Put more bluntly, my independence in daily living will become a moot point if I am no longer alive to enjoy independence in daily living. Being able to grow vegetables year-round is the bone of contention here. My counselor feels the current facilities are adequate to the task. I maintain they are merely adequate for the task in summer and have more than
illustrated my point. They might be adequate for some but not for my circumstances based on my subset of disabilities - direct sun and temperature.

GROWING FLOWERS IN THE BORROWED GREENHOUSE

VA has obliquely inserted this into the decision to imply my desire to grow vegetables in a controlled environment is somehow suspect or some ploy to con the VA into purchasing a greenhouse with ILP funds. My desire is for edible vegetables and nothing more. I do not have vocational plans to grow flowers for profit and sell them. The VA counselor was in error when he asserts in part the following on May 4th, 2011:

His hobbies are light gardening, growing plants and flowers in his greenhouses and helping other veterans with their VA claims as an advocate, assists through the use of his website ASKHOD (sic), which he developed."

The available space in the current greenhouse I borrow precludes anything as extravagant as growing flowers. Every square inch of available space is devoted to foodstuffs. I do raise seed stock and sell the starts to Sunnycrest Nursery, Key Center Washington. I request they donate all proceeds to Veteran’s causes.

VA CONTENDS I HELP VETERANS AS A VOCATION

The counselor also uses the word “hobbies” in the sentence above as in avocational pursuits. I infer this from the conjunctive use of the word “and” before “helping Vets”. This is probably the reason for my denial. Miriam Webster defines avocation as:

**Definition of AVOCATION**

1
*archaic*: DIVERSION, DISTRACTION

2
: customary employment : VOCATION

3
a subordinate occupation pursued in addition to one's vocation especially for enjoyment : HOBBY

One will notice the synonym of “hobby” after definition number three. This creates a schism in the denial. How can it be that I engage in a “hobby” of helping other Veterans with their claims? By the VA’s own definition, this is avocational yet they have issued me a computer with which to do so. If growing vegetables is a hobby- i.e. avocational in nature- and thus impermissible, how can it then be an avocational endeavor to engage in the hobby of helping Vets with a VA-issued computer.

Any reasoned discussion of this would elicit a flurry of questions as to how VA can be at odds on their interpretation of the two requests. Either the decision to grant the computer was clearly and unmistakably erroneous or the decision to deny the greenhouse is. Both decisions cannot stand under the same definition.

A concise plan for Independence in daily living has not been coordinated. It has been dictated and handed down. A discourse to an accommodation has never taken place. Simply informing me that VA will never authorize a greenhouse under any circumstances contravenes 38 CFR §21.92 (b). An ILP program has to involve all members to the agreement rather than a simple decision that excludes the Veteran in all but the receipt of the denial.

The decision does not comprehend my level of disability. Nowhere in the decision is there a discussion of my physical limitations as mentioned in chapter 8.02(e) “Options may be limited by skill deficits or by physical, environmental, or psychological factors.”

In conjunction with my Porphyria Cutanea Tarda and diagnosed cryoglobulinemia (Raynaud’s phenomenon), my fatigue and near-constant debilitating symptoms from HCV and my fibromyalgia, working outside at temperatures below 40 degrees causes prolonged pain and discomfort.

My liver has been compromised by service connected Hepatitis and Porphyria Cutanea Tarda. There are other nonservice connected disabilities at play here as well that severely constrain my activities outdoors.
I have parsed the meaning of “necessary and vital” as described in VA General Counsel Precedent 6-2001. In no way, shape or form does it restrict or re-interpret VA General Counsel Precedent 34-1997.

I have parsed the meaning of independence in daily living in several VA regulations. Independence to grow vegetables or a Health Maintenance Program are never discussed in the SOC. The thrust of the argument rests entirely on the mistaken assumption that I possess numerous, adequate greenhouses, well heated, and capable of producing vegetables year-around.

Any denial must have adequate reasons and bases for a finding (38 CFR 19.29). Bare conclusory statements based on broad, unsupported conclusions have been found to be of no probative value in a decision making process. Conclusions must be supported by facts and include a discussion on why VA’s conclusions are correct and why mine are incorrect. In other words, the Reasons and bases for the denial must be easily understood so that I may rebut them on appeal. See Tucker v. West, 11 Vet.App. 369, 374 (1998)

The SOC puts forth a rationale that I hope to avoid buying my vegetables by growing them and thus is unsupported by the Independence in daily living argument. I have pointed out growing my own produce is not an attempt to retreat from the community but an attempt to produce food that will permit me to live longer due to my compromised digestive system and my particular subset of illnesses that preclude working out of doors. The object has never been to save money or produce it for fun and profit. The argument is couched in the “necessary and vital” language in General Counsel Precedent 6-2001. Regardless, General Counsel Precedent 34-1997 permits hobbies which is a synonym for avocational.

Any decision that avoids or seeks to sidestep a discussion on my health falls afoul of the discussion in the M-28, as well as the §21.160(d)(iv) paragraph.

There is no discussion of my health in the decision. There is no discussion of my physical limitations or avocational desires. The decision is based on flawed findings of fact.
My arguments are couched in need predicated on ability and health maintenance [38 CFR 21.160(d)(iv)]. VA has chosen to ignore this and deny based on nebulous measurements couched in independence and necessity. Lost in the rush to judgment is any discussion of what abilities or assets I do have.

**Semantic fig leaf of “avocational”**

Remove the word and what are we left with? A self-administered health maintenance program which is permissible; a program necessary and vital to maintaining health; a permissible program under the auspices of VA General Counsel Precedent 34-1997 and 6-2001. A program comprehended by 38 USCs §§ 3103(d), 3120.

The VA counselor insists the IL Program is vocational in nature and does not permit avocational applications. A truly vocational pursuit, by definition, is one that will eventually result in a paying job. The whole discussion in §21.160 focuses on what happens when the prospect of seeking a vocation is thwarted by mental or physical disabilities which are service connected. It does not preclude participation to only those who can be rehabilitated and attain a vocational goal.

The actual language is important as it was chosen by the Secretary of Veterans Affairs to effect the IL program as described in 38 USC §3120. Nowhere in §3120 is it written or mentioned that “avocational” programs are forbidden. The clear intent of Congress was that there was a small universe of Veterans who were “severely handicapped” and for whom the prospect of a vocational goal was infeasible. Based on that, a parallel program entitling these Veterans to a separate but equal access to rehabilitation via learning “life skills” necessary to independence in everyday living was configured. Nowhere in the language of 38 USC or 38 CFR is the term “avocational” used in such a way as to preclude severely handicapped Veterans from accessing certain services unique to their circumstances.

The Veterans Administration is considered a nonadversarial Agency which strives to provide Veterans with life tools to flourish in a closed environment. Being severely disabled and incapable of pursuing a vocational goal leaves few alternatives. Congress would not go to great lengths to inaugurate a program
for a disadvantaged few, then promptly turn around and semantically disenfranchise them. Yet this is what the decision purports to state. I have been determined to be incapable of a vocational goal. Since the plain thrust of §3120’s language is geared towards the word “vocational”, the default setting forbidding any activity or life skill revolves around “necessary or vital” and whether it will facilitate independence in everyday living. VA rationalizes that any life skill I pursue is not vocational in nature because my disabilities preclude it. 38 CFR§21.160(c)(4) states that Independent Living Services, which I take to mean the Independent Living Program, may be furnished “as a program of rehabilitation services for eligible Veterans for whom achievement of a vocational goal is not currently feasible.”

The VA’s rationale for denial is multifold but the underlying denial is predicated on several flawed findings. While the VA does not dispute that I am severely disabled, they agree that the concept of having a greenhouse is acceptable for vocational rehabilitation. The argument devolves into a denial when additional greenhouses are added to the mix. As discussed above, There is one and only one greenhouse which does not belong to me. It is inadequate for purposes of growing year round because it is not heated. It is difficult to access and will become more so in the near future because it is not ADA-accessible. There is no room to sit down inside out of the elements which I need to attenuate the effects of my diseases/disabilities.

Included in the denial decision is the discussion that I would be dependent on the new greenhouse “in performing a critical function of my activities of daily living” (ADL). Since I currently perform these during all seasons but winter, I would not be “more dependent” but less so. Contrary to the denial language, a heated greenhouse would sustain me to function more independently of others because I would be able to access it year round entirely by myself.

The finding that an “additional greenhouse” is a bald attempt “to use avocational intervention to sustain independence in daily living is not necessary, reasonable or justifiable under 38 CFR §21.160” clearly admits I can sustain independence in daily living with the current one I am borrowing. VA’s argument is self-defeating. The decision focuses narrowly on “additional greenhouses” to the exclusion of actual facts. A Statement of the Case is issued
with the goal of explaining the reasoning behind the denial of a claim or grant and to facilitate an appeal. 38 CFR §19.29 purports to lay out the parameters of what a proper SOC consists of:

§ 19.29

Statement of the Case.

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

(a) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement;

(b) A summary of the applicable laws and regulations, with appropriate citations, and a discussion of how such laws and regulations affect the determination; and

(c) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed.

Here, the Statement of the Case elaborates on “additional greenhouses and ignores my arguments in my Notice of Disagreement. I specifically disagreed with the finding that my Porphyria Cutanea Tarda does not preclude me from being exposed to direct sunlight. This and my Cryoglobulinemia which manifests itself as Reynaud’s phenomenon make my current, unheated greenhouse untenable and inaccessible in winter months.

Since the SOC pointedly bases its premise on numerous cold frames and raised planter beds conflated together to be “greenhouses”, the document is flawed.

Semantically trying to deny Independent Living Program requests by purposefully misconstruing the true facts goes against the professed, nonadversarial nature of the VA. In fact, nowhere is there even a discussion of 38 USC §5107. Similarly, trying to use the term “avocational” to imply that I simply want a greenhouse for entertainment value is disingenuous. I have made my argument for a heated structure capable of year-round vegetable production
based on a health need (38 CFR §21.160(d)(iv). This argument has not been discussed or rebutted as required in §19.29(c) above.

Last, but not least, the VA relies on a post hoc rationalization to explain why a computer can be provided “to enhance the Veteran’s ability to communicate with external partners, veterans and constituents as an advocate for Veterans benefits. These activities provide the Veteran an outlet to increase external communication within the community and as a means for the Veteran to increase self-actualization by providing services to others.”

VA has rationalized what is clearly an “avocational” pursuit for my IL program. No one can argue that. I do not receive remuneration for my work. It is done in my spare time as a hobby to help other Veterans attain service connection. I offer a “do it yourself” cornucopia of knowledge sprinkled with humor and jokes. A psychologist would be hard-pressed to label this a “vocational endeavor with a goal towards rehabilitation and a return to the work force with a living wage”. In fact, the counselor specifically referred to it as a hobby in April 2011.

Miriam Webster, VA’s go-to dictionary, has this to say about self-actualization.

**Definition of SELF-ACTUALIZE**

to realize fully one’s potential

A discussion of the term in psychiatric circles reveals it to be a desire of the individual to “be all he can be” or to make the most of his given potential. Kurt Goldstein’s book *The Organism: A Holistic Approach to Biology Derived from Pathological Data in Man* (1939) is a case study in self-actualization. Goldstein’s concept of self-actualization cannot be understood as a kind of goal to be reached sometime in the future. In fact, his concept of the human has the fundamental tendency to actualize all its capacities, its whole potential, as it is present in exactly that moment in exactly that situation in contact with the world under the given circumstances.

With this definition in hand, can it not be said that my desire to grow healthy, pesticide-free vegetables, most especially in winter, is my desire to self-actualize my abilities as a gardener? Additionally, as I provide extra seedlings for resale to a nursery, is that not vocational in nature?
Finally, the legal criteria to grant this claim is ignored and never addressed in the SOC. VA's General Counsel Precedent 34-1997 is more than clear on the subject of hobbies or avocational pursuits. Recreational pursuits are not only within the purview of the Independent Living program but anticipated and are not categorically disallowed as the VA counselor insists. Proper research of any VR&E ILP claim would be incomplete without a discussion of this precedent. Since it is a precedent and an in-depth interpretation of the meaning of §21.160, the VA counselor is bound by its holding. Here is the precedent (in part) and I have taken the liberty of bolding the pertinent parts.

VAOPGCPREC 34-1997

In paragraph 6 under Discussion, it says:

6. The issue before us concerns whether that broad discretion, nevertheless, is circumscribed as a matter of current law to exclude the provision of services and assistance that would enable a veteran to participate in recreational activity.

Paragraph 7 goes on to discuss the legislative history:

7. Plainly, no such preclusion existed when the chapter 31 independent living program was enacted in 1980. Then, as at the time of the instant case, subsection 3104(b) of that chapter provided that “[a] program of independent living services and assistance may include the types of services and assistance described in section 702 of the Rehabilitation Act of 1973 (29 U.S.C. § 796a),” and recreational activities were expressly listed among those described services. In 1992, however, section 702 of the Rehabilitation Act was repealed (Pub. L. No. 102-569, title VII, § 701(1), (2), Oct. 29, 1992), with no conforming change to the section 702 reference found in section 3104(b). Moreover, the latter section’s provisions on independent living services themselves were eliminated in 1996 (Pub. L. No. 104-275, § 101(d)(2), Oct. 9, 1996). Thus, on the surface, the law applicable to the veteran’s claim for assistance, which was made in 1995, after the 1992 elimination of section 702
and before the 1996 elimination of section 3104(b), does appear somewhat murky.

Paragraph 8 continues the hunt for the answer:

8. Our research discloses that, although section 702 was repealed, the same law that did so actually broadened the scope of authorized independent living services within a new definition of those services under section 7(30)(B) of the Rehabilitation Act, as amended. Subclause (xiii) of that new definition expressly lists “individual and group social and recreational services” within the meaning of “independent living services.” Thus, the recognition of recreational activities as a component of independent living services under non-VA vocational rehabilitation programs governed by that Act continued unabated.

Paragraph 9 adequately researches the Congressional intent and can find no evidence that Congress intended to rule out recreational pursuits:

9. We have not found in the 1992 legislative history for the Rehabilitation Act amendments, or elsewhere, an explanation for Congress’ omission of a conforming change to subsection 3104(b), replacing the obsolete section 702 Rehabilitation Act reference with the new section 7(30)(B) reference. Nevertheless, when Congress originally enacted subsection 3104(b), it patently intended to authorize the Secretary to provide independent living services of the same nature as authorized by the Rehabilitation Act, and we find nothing in the 1992 amendment to that Act suggesting any intent to alter the scope of the chapter 31 authority.

Paragraph 11 grants the Seattle vocational counselors the legal authority to grant a request they deem recreational in nature.

11. Instead, the plain congressional directive of the current law is that the Secretary must afford the services and assistance deemed necessary to accomplish the broad statutory program objective of enabling eligible veterans to achieve maximum independence in daily living. Thus, if the Secretary considers a particular service necessary to enable the individual to participate in family and community activities, even when those activities are recreational
in nature, that service may be included as an appropriate part of an individual's independent living program.

The holding is summarized here just in case there is still some confusion on the legality of avocational pursuits:

HELD

1. No statute or regulation, including section 702 of the Rehabilitation Act of 1973 and its associated regulations, either specifically directs VA to authorize or precludes VA from authorizing services and assistance of a recreational nature as a component of an eligible veteran's program of independent living services and assistance under 38 U.S.C. § 3120.

2. VA has the authority, and responsibility, to provide all services and assistance deemed necessary on the facts of the particular case to enable an eligible veteran participating in such a program to live and function independently in his or her family and community without, or with a reduced level of, the services of others. This includes the authority to approve, when appropriate, services and assistance that are in whole or part recreational in character when the services are found to be needed to enable or enhance the veteran's ability to engage in family and community activities integral to the veteran’s achieving his or her independent living program goals.

I do hope this clears up the confusion. If there is some other point of law that the counselor feels is on point that contradicts the General Counsel’s holding on this, please include it in the Supplemental Statement of the Case.
Also, attached please find current pictures of existing garden as of the submission date of this Form 9. It clearly reveals the nature and number of “greenhouses” (1) on site.

I have also been informed that my participation in the IL Program has been terminated and I have been rehabilitated. I disagree with this assessment and ask that my participation in the ILP be equitably tolled until this appeal is resolved.

I certify that the above is true and correct to the best of my knowledge or belief.

Sincerely,

Gordon A. Graham

1234 Yellow Brick Road

Oz, Kansas 60609

Four (4) Attached exhibits:

two (2) pictures of garden area and structures.

VISTA history of diseases/injuries dated April 04th, 2010 documenting Crohn's disease, Hepatitis C, Porphyria Cutanea Tarda, Cryoglobulinemia, anemia, and autoimmune hepatitis (AIH), degenerative disc disease (DDD), and MRSA. (RBA @ 484)

Page two of March 29, 2010 award of 40% for monthly blood phlebotomies due to service-connected Porphyria Cutanea Tarda. (RBA @ 572).
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