



# **BOARD OF VETERANS' APPEALS**

**FOR THE SECRETARY OF VETERANS AFFAIRS**

**IN THE APPEAL OF  
GORDON A. GRAHAM**

**SS XXX XX 3747  
Docket No. 190909-55963  
Advanced on the Docket**

**DATE: May 9, 2024**

## **ORDER**

Entitlement to a 20 foot x 28 foot Americans with Disabilities Act (ADA)-compliant greenhouse pursuant to a Veteran Readiness and Employment (VR&E) Independent Living Plan (ILP) under Title 38, United States Code, Chapter 31 is granted.

## **FINDING OF FACT**

In April 2017, the Veteran and his vocational counselor mutually agreed upon a 20 foot x 28 foot heated, ADA-compliant greenhouse on concrete grade with indoor lights, 4 electrical outlets, 4 water bibs, and a hydroponic system.

## **CONCLUSION OF LAW**

The criteria for entitlement to a 20 foot x 28 foot greenhouse pursuant to a VR&E Independent Living Program under Chapter 31, Title 38 of the United States Code have been met. 38 U.S.C. §§ 3104(a)(15), 3109, 3120; 38 C.F.R. § 21.160.

## **REASONS AND BASES FOR FINDING AND CONCLUSION**

The Veteran served on active duty from October 1969 to February 1973.

This appeal comes to the Board of Veterans' Appeals (Board) from an April 2018 decision by the VR&E Division of the Department of Veterans Affairs (VA) Regional Office (RO). The Veteran submitted a notice of disagreement (NOD) (VA Form 21-0958) in October 2018, and the RO issued a statement of the case (SOC) in April 2019.

The Appeals Modernization Act (AMA) allows VA claimants to opt into the modernized review system by requesting review of an SOC or supplemental SOC (SSOC) issued on or after February 19, 2019 if the opt-in is received within one year of the date of the notification of the underlying rating decision, or 60 days from the issuance of the SOC/SSOC, whichever is later. Here, the Veteran elected to appeal to the Board of Veterans' Appeals (Board) via the modernized appeal system in September 2019, after receiving the April 2019 SOC. *See* September 2019 Form 10182 (Decision Review Request: Board Appeal (Notice of Disagreement)). The Veteran requested a hearing with a Veterans Law Judge. 38 C.F.R. §§ 20.201, 20.202(b)(2).

In January 2024, the Veteran testified at a Board hearing before the undersigned Veterans Law Judge. A transcript of that hearing has been associated with the record. Under the hearing review option, the Board may consider only the evidence of record at the time of the agency of original jurisdiction (AOJ) decision on appeal, as well as any evidence submitted by the Veteran at the hearing or within 90 days following the hearing. 38 C.F.R. § 20.302(a). The Board cannot consider (1) evidence submitted during the period after the AOJ issued the decision on appeal and before the hearing was held, or (2) evidence submitted more than 90 days after the hearing was held. 38 C.F.R. § 20.302. Ninety days from the January 2024 hearing was April 9, 2024.

If evidence was associated with the claims file during a period of time when additional evidence was not allowed, the Board has not considered it in its decision on the within claim. 38 C.F.R. § 20.300. If the Veteran would like VA to consider any evidence that was added to the claims file that the Board could not consider, the Veteran may file a Supplemental Claim (VA Form 20-0995) and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim, considering the new evidence in addition

to the evidence previously considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.

### VR&E Benefits

The Veteran is seeking entitlement to the purchase of an ADA-compliant greenhouse previously granted by the Board in a September 2015 decision. Specifically, the Veteran has requested the purchase of a 20 foot x 28 foot greenhouse, rather than the 15 foot x 20 foot greenhouse that was approved by the AOJ.

This appeal has a long factual and procedural history. By way of background, the Veteran was previously determined in May 2011 to have a serious employment handicap but a vocational goal was not reasonably feasible.

In May 2012, a document for the Veteran's orientation to the Independent Living program noted that he "want[ed] an extension added to his existing green house," and that he "[grew] tomatoes and other vegetables for his family and [took] the remainder to a co[-]op food bank." *See* May 2012 Special Report of Training. The note documented that the Veteran stated he wanted to be independent and self-sufficient from the local grocery store, and characterized this activity as avocational. *Id.*

The Veteran's request for a greenhouse was denied as unnecessary for independent living. *See* October 2012 VR&E Decision. Specifically, the VR&E counseling psychologist (CP) noted that the Veteran was able to "perform the avocational activities involved in planting, producing and cultivating in [his] current agricultural activities," therefore he did not require a greenhouse, or an additional greenhouse, for independence in his daily living activities. *Id.*

However, the Veteran testified in an April 2015 hearing before the Board that he warranted a larger greenhouse with raised tables and rubber mats on the floors so he could use his wheelchair and would not become injured in case he fell. He stated that an ADA-compliant greenhouse would protect him from the sun and low temperatures due to his cryoglobulinemia and porphyria cutanea tarda (PCT), and

would essentially allow him access to the outside that he might not have otherwise. He reported that his PCT caused skin eruptions with sun exposure and that because of the cryoglobulinemia, weather below 40 degrees caused his blood to coagulate in his ears, hands, nose, and feet. The Veteran also submitted photographs of his current greenhouse. He noted that it was borrowed, and that it was not wide enough for wheelchair access.

In September 2015, the Board found that the Veteran's current "greenhouse"-type structures do not allow him access during the day due to excessive sunlight and during cold weather, which he testified is frequent where he lives, as well as at times when he is unable to walk or stand. The Veterans Law Judge remarked in the decision that the Veteran is frequently alone and he should not be compelled to unreasonably restrict his recreational activities in his home activities. The Veterans Law Judge wrote that as to integration into community, the record suggests that the Veteran's gardening is in effect a very small farming operation for his own use as well as benefiting others. The Board therefore granted the Veteran an ADA-compliant greenhouse pursuant to his ILP; however, a specific size was not determined. *See* September 4, 2015 Board decision.

Following issuance of the Board's decision, the AOJ and the Veteran disputed the size of the greenhouse. For instance, in February 2016, the Veteran submitted a proposal for a 50 foot x 100 foot greenhouse at an estimated cost of \$90,000.

In March 2016, the CP determined that a 10 foot x 15 foot greenhouse "will not only accomplish [the Veteran's] ADA needs but will provide a greater opportunity to grow more agriculture produce, year[-]round." *See* March 2016 VA Form 28-1902n, Counseling Record-Narrative (Supplemental Sheet). According to the counselor, the "statement of work" will include the ADA standard criteria. *Id.*

In July 2016, the CP proposed an updated Individualized Independent Living Plan (IILP) for the construction of an ADA-compliant greenhouse in accordance with the requirements of the Federal Acquisition Regulations and the September 2015 Board decision. *See* July 2016 Rehabilitation Plan.

However, the proposed plan was not signed by the Veteran. Instead, in a July 2016 statement, the Veteran disagreed with the proposed IILP, arguing that the proposed greenhouse structure does not conform to the September 2015 Board decision. The Veteran argued that the proposed 15 foot x 20 foot greenhouse is not a sufficient size to accommodate his service-connected disabilities.

An October 2016 Counseling Record-Narrative Report outlines the results of a meeting between the CP and the Veteran. At that time, the CP and the Veteran went back and forth on the size of the greenhouse before the VRC noted that “[f]or now, we settled on a 24 foot x 24 foot Greenhouse to move things along.”

Later that month, the CP issued a letter to the Veteran “proposing I.L. services that would allow you to overcome your dependency issues as it relates to your activity of daily living.” Specifically, as it relates to the greenhouse, the CP proposed that VR&E will provide a 20 foot x 28 foot x 12 foot heated greenhouse with louvers and temperature control, to include ADA height tables, ADA access doors, ADA aisle-way access, lights and growing lights as necessary, and 8 mil. UV poly-carbonate material. The CP indicated that a 20 foot x 28 foot x 12 foot greenhouse would allow the Veteran to produce crops year-round. It was noted that he currently has limited access due to a wheelchair. VR&E would provide 8 mil. UV poly-carbonate material due to sun sensitivity and a hydroponic system due to lifting limitations.

The CP also obtained a “Statement of Objective” in December 2016 for the home modification detailing the estimated schedule and costs of the project. Significantly, the estimates provided were based on providing 20 foot x 28 foot heated greenhouse. *Id.*

In April 2017, the CP prepared a document showing the estimate total cost of \$56,469 for a 20 foot x 28 foot greenhouse, lights, electric compost toilet, and veterans benefit manual. Later that month, a document was signed by the CP and the Veteran indicating agreement to a “Greenhouse 20 foot x 28 foot, on concrete grade, heated, ADA, indoor lights, 4 ea. Elec outlets, 4 ea water bibs, Hydroponic system[,] 1 ea electrical composting toilet, 2016 & 2017 Advocates package

‘Veterans Benefits Manual’ by NVLSP.” *See* April 2017 VA Form 28-1905m, Request for and Receipt of Supplies.

In an August 2017 memorandum to the VR&E Director requesting approval for construction costs exceeding \$15,000, a VR&E Officer explained that the 20 foot x 28 foot greenhouse was agreed to by the Veteran. *See* August 2017 VRE Correspondence. However, it was noted that “Seattle VR&EO conducted on-going discussions with the staff from VR&E services on the specifics of determining the validity of the Veteran’s request versus his actual IL needs. It was determined in a final discussion on August 3, 2017, that we would fully meet the Veteran’s IL needs providing the 15 foot x 20 foot greenhouse as originally designed.” *Id.* As a result of the memorandum, the VR&E Director approved the project for a 15 foot x 20 foot greenhouse only.

In an April 2018 memorandum, a vocational rehabilitation counselor (VRC) requested to discontinue the Veteran’s claim due to infeasibility. The VRC stated that VR&E offered to develop a plan of services including a 15 foot x 20 foot greenhouse with basic hydroponic system to meet his IL needs. According to the VRC, VR&E was prepared to move forward, but the Veteran refused services insisting on a larger greenhouse.

In a May 2018 declaration, a VR&E Officer stated that the Veteran presented requests for a 50 foot x 100 foot or 24 foot x 28 foot greenhouse, which were rejected by VR&E. Rather, the VR&E Officer stated that a proposal for a 15 foot x 20 foot greenhouse with basic hydroponics was presented that was ADA-compliant. Nevertheless, the VR&E Officer remarked that the Veteran insisted on a larger greenhouse. The Officer informed the Veteran it was highly unlikely to get approval for a 24 foot x 28 foot greenhouse because there was no legitimate justification for it. The Officer stated that the Veteran has provided no data or medical evidence to justify the need for a larger greenhouse besides his preliminary vision of a commercial-sized greenhouse.

At a January 2024 Board hearing, the Veteran testified that he mutually agreed with his former CP in April 2017 to a 20 foot x 28 foot greenhouse with hydroponics and lighting. He explained that he was later told by a newly-assigned vocational

rehabilitation counselor that he was only approved for a 15 foot x 20 foot greenhouse. He explained that he was never a part of the decision to change the size of the greenhouse.

In consideration of the foregoing and after a thorough review of the record, the Board agrees with the AOJ's determination. In pertinent part, the evidence that the Veteran's former counselor issued a proposal in October 2016 whereby VR&E would provide a 20 foot x 28 foot heated greenhouse with louvers and temperature control, ADA-height tables, ADA-access doors, ADA aisle-way access, lights, and 8 mil. UV poly-carbonate material. Subsequently, the parties mutually agreed to the proposal when they both signed the VA Form 28-1905m in April 2017 which specifically outlined a "Greenhouse 20 foot x 28 foot, on concrete grade, heated, ADA, indoor lights, 4 ea. Elec outlets, 4 ea water bibs, Hydroponic system. 1 ea electrical composting toilet, 2016 & 2017 Advocates package 'Veterans Benefits Manual' by NVLSP."

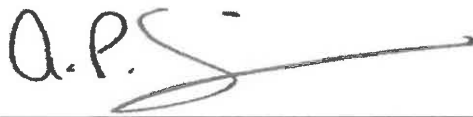
Despite this agreement, funding approval was submitted to the VR&E Director for only a 15 foot x 20 foot greenhouse on the basis that VR&E staff determined that a greenhouse of that size would meet the Veteran's needs. However, as noted by the Veteran, he was not apprised of any of these meetings or offered the opportunity to discuss a change in size of the greenhouse. Moreover, the memorandum largely discusses the associated costs to operate and maintain a 15 foot x 20 foot greenhouse, as well as the Veteran's functional capacity. Little, if any, discussion was provided regarding whether a 15 foot x 20 foot greenhouse would be ADA-compliant in light of the Veteran's service-connected disabilities as granted by the Board in the September 2015 decision.

The Board also observes that a VR&E Officer appears to argue in his May 2018 declaration that the Veteran insisted on a 24 foot x 28 foot greenhouse (or larger) instead of the offered 15 foot x 20 foot greenhouse. However, the VR&E Officer neglected to discuss the 20 foot x 28 foot heated greenhouse previously agreed upon in April 2017 and signed by both parties, and why that offer was rescinded.

Given the record before it, the Board finds the evidence persuasively weighs in favor of the purchase of a 20 foot x 28 foot greenhouse. As noted, the Veteran's

former counselor proposed a greenhouse measuring 20 foot x 28 foot and the parties mutually agreed to the proposal. *See* October 2016 VRE Correspondence; April 2017 VA Form 28-1905m. As the evidence is in approximate balance, the benefit-of-the-doubt rule applies and entitlement to a 20 foot x 28 foot heated, ADA-compliant greenhouse on concrete grade with indoor lights, 4 ea. Elec outlets, 4 ea water bibs, and Hydroponic system is granted.

The Board notes that within the April 2017 signed agreement for the 20 foot x 28 foot greenhouse, it included: (1) an electric composting toilet and (2) a 2016 and 2017 Advocates package “Veterans Benefits Manual” by the National Veterans Legal Services Program (NVLSP). At the January 2024 Board hearing, the Veteran testified he had put in bathroom near his garden and thus he did not need the electric composting toilet anymore. He explicitly stated he withdrew that from the signed agreement. *See* January 2024 Board Hearing Transcript, at pp. 17-18, 31-32. The Veteran also testified that he did not need the NVLSP manual, and stated he withdrew that from the April 2017 signed agreement as well. *Id.*



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A. P. SIMPSON  
Veterans Law Judge  
Board of Veterans’ Appeals

Attorney for the Board

R. Kettler, Counsel

*The Board’s decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.*