

ERISA & DISABILITY BENEFITS NEWSLETTER

ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

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MANAGING THE IMPACT OF SURVEILLANCE FOOTAGE BY: R. SCOTT WILSON, ESQ

Video surveillance can be a powerful tool in the hands of an insurer bent on denying a disability claim. And if you regard that to be a biased, one-sided view of either investigators or disability insurers, consider *Green v. Union Sec. Ins. Co.*, 700 F.Supp.2d 1116 (W.D. Mo. 2010). In his annual "self-evaluations" obtained in discovery, the investigator discussed in detail his role in helping to deny claims, including the number of denials, the money saved for the insurer, and even how the timing of the surveillance could assist in making sure the claim stayed denied.

If nothing else, the presence of surveillance video footage can prompt the decision-maker to disregard medical data and opinions, and instead compare the appearance of the claimant with pre-conceived notions of what "crippled" looks like. Surveillance footage is never a positive for the claimant. However, there are ways to minimize the impact of surveillance.

It is not uncommon that the first time a representative finds out about surveillance is in the insurance company's denial letter. And given the "closed record" nature of ERISA benefits litigation, there is frequently no opportunity to submit additional evidence to either rebut or explain the surveillance findings. Fortunately, however, there is a wealth of case law that can be relied on to minimize the value of surveillance as evidence proving non-disability.

Disability is typically defined in vocational terms: the ability (or inability) to perform certain relevant jobs. But it would be a rare situation indeed that surveillance video docu-

mented a claimant performing activities that were a close facsimile of his or her job duties. Rather, surveillance footage will typically show a claimant involved in various activities of daily living: errands, driving, shopping, chores. However, as stated by one appeals court, "we do not believe that participation in everyday activities of short duration, such as housework or fishing, disqualifies a claimant from disability." *Lewis v. Callahan*, 125 F.3d 1436, 1441 (11th Cir. 1997). A claimant's ability to perform simple functions such as driving, grocery shopping, dish washing and floor sweeping, does not indicate an ability to perform substantial gainful activity where those activities are performed on an intermittent basis due to pain. *Walston v. Gardner*, 381 F.2d 580, 586-87 (6th Cir. 1967).

Consequently, numerous courts have held that surveillance footage showing no more than intermittent engagement in normal activities of daily living will be insufficient to deny long term disability insurance benefits. In *Hanusik v. Hartford Life Ins. Co.*, the court reasoned:

Hartford's reliance on the video surveillance of Plaintiff in deciding to terminate her LTD benefits was neither reasonable nor rational. Hartford makes much of the fact that it captured footage of Plaintiff in the acts of, among other things, walking for about a mile on five occasions for about a half hour; operating a car on five occasions; going to church on two occasions; and scratching her back on two

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occasions. However, it was never alleged that Plaintiff was unable to do any of these activities. . . . Dr. Slain indicated that Plaintiff was unable to do all of those activities on the same day for a continuous period of eight or four hours. . . . [T]he video surveillance fails to show Plaintiff either performing any single or combination of activities for an eight or four hour period, or strenuously exerting herself over the course of two consecutive days.

2008 WL 283714 (E.D. Mich. Jan. 31, 2008). See also *Thivierge v. Hartford Life & Accident Ins. Co.*, 2006 U.S. Dist. LEXIS 25216, at *31 (N.D. Cal. 2006) (holding walking, driving, and running errands for a couple of hours a day on five out of the six days the plaintiff was under surveillance did not mean the plaintiff was able to work an eight hour a day job); *Sanders v. Hartford Insurance Co.*, 2006 U.S. Dist. LEXIS 21939, *12 (D. Ark. 2006); *Holler v. Hartford Life & Accident Ins. Co.*, 2005 U.S. Dist. LEXIS 25099 (S.D. Ohio Oct. 26, 2005).

While surveillance footage may be ineffective at demonstrating ability to perform specific work duties, or to sustain activity over a full-time work schedule, it can be very effective at demonstrating a claimant to be a liar. Over the course of a disability application, the insurer will require the claimant to complete all sorts of paperwork and questionnaires. Claimants should be encouraged to answer questions, particularly questions about daily activities, using terms like "sometimes," "often," "occasionally," and "usually." Avoid terms like "always" and "never." Footage of a person briefly entering a store to pick up a loaf of bread and some milk may be insufficient to demonstrate that he is capable of full-time sedentary work. See *supra*. But it can very effectively rebut the claimant's statement on a questionnaire that he "never" goes to the store, and that he "always" uses a cane. And once the claimant is proved untruthful or incredible on one point, his credibility is called into question on all other points as well. This can even undercut the opinions of treating physicians who have

relied, in part, on descriptions of symptoms to reach diagnostic conclusions.

In this regard, it is also useful (if possible) to develop evidence, both statements from the claimant and his doctors, that his condition is not static or constant, but instead is variable over time, with good days and bad days. Evidence of diminished stamina or ability to sustain activity without increase in pain or other symptoms is likewise useful. Surveillance reports typically detail a ratio of hours of inactivity to just minutes of observed activity, which can be perfectly consistent with a claimant's variable symptoms levels.

Finally, while the insurance company is hardly going to inform you ahead of time that it intends to obtain surveillance, it is possible to make some educated guesses. Claims are frequently given greater scrutiny as the claimant approaches the 24-month own-occupation/any-occupation definition switch. It is also common that the insurer will obtain surveillance in a window of time surrounding an IME or FCE: after all, it knows your client will be out and about on that day. And video footage of your client going out to lunch and running a series of errands after an FCE will greatly undercut any statements about the degree of pain and fatigue he was experiencing at the FCE. Once again, surveillance may be ineffective at demonstrating your client to be capable of work, but can be highly effective at demonstrating your client to be a liar.

In conclusion, surveillance is never a good thing, but it can be managed. Surveillance typically shows ordinary daily activities, not activities that closely correlate with job duties. On a closed record, therefore, emphasize case law holding that ordinary daily activities, performed on an intermittent basis due to pain, do not establish the ability to work. Use of "sometimes" and "usually," not "always" and "never," in describing symptoms and their effect on functioning will limit the ability of surveillance to contradict your client's prior statements. And caution your clients that surveillance is always possible, and the times that it may be more likely.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding Social Security Disability, ERISA Long-term Disability, Group Long-term Disability, Private Disability Insurance, ERISA Benefits, Denied Health Insurance Claims and Life Insurance Claims. Contact Molina Haynes, Office Manager at (423) 634-2506 or via email at mhaynes@buchanandisability.com

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