Latest Trends, Techniques, and Case Law on Surveillance in Disability Insurance Litigation

Michael W. Thrall

*Nyemaster Goode P.C.*

700 Walnut Street, Suite 1600
Des Moines, IA 50309
(515) 283-3189
mwt@nyemaster.com
Michael W. Thrall is a shareholder with Nyemaster Goode, P.C. in Des Moines, Iowa, where he has defended life, health, and disability insurers in ERISA, benefit, and bad-faith litigation for over 25 years. A fellow of the American College of Trial Lawyers and a member of ABOTA, Mr. Thrall is an experienced trial attorney who also has an active commercial litigation and complex tort defense practice.
Latest Trends, Techniques, and Case Law on Surveillance in Disability Insurance Litigation

Table of Contents

I. Content ...........................................................................................................................................................5
II. Conclusion ......................................................................................................................................................7
I. Content

The old adage that “a picture is worth a thousand words” is never more true than when applied to the importance of surveillance in rebutting claims of disability and physical limitations in litigation. However, in disability insurance litigation, it has become increasingly important that the “picture” be accompanied by “a thousand words.” One relies on surveillance alone at one’s peril. To be effective, damning surveillance should be accompanied by the testimony of medical and/or vocational experts, whether treating physicians or independent experts, correlating what the surveillance reveals with how it relates to the plaintiff’s ability to function and, more importantly, the plaintiff’s ability to work.

Cases involving surveillance are highly fact specific, turning both on the nature of the alleged limitations and the extent to which the surveillance video refutes the claimed limitations. The more definitive and extensive the claimed limitations, both in scope and time experienced, the more likely surveillance will be of benefit. However, the value of surveillance as part of the evidence refuting a plaintiff’s disability claim cannot be denied.

Courts “have long recognized that even limited surveillance is a useful way to check the credibility of individuals who claim disability based on symptoms that are difficult to evaluate through objective test.” Gross v. Sun Life Assurance Co. of Can., 734 F.3d 1, 25 (1st Cir. 2013). “Video evidence need not establish conclusively that a benefits claimant can work full time.” Green v. Union Sec. Ins. Co., 646 F.3d 1042, 1052 (8th Cir. 2011). Video surveillance provides another form of objective evidence upon which the determination can be made. Id. Indeed, where there is no definite evidence of a disabling illness or condition, surveillance alone may be sufficient to deny a disability claim. Gross, 734 F.3d at 25. See Mennenoh v. Unum Life Ins. Co. of Am., 302 F. Supp. 2d 982, 988 (W.D. Wisc. 2003) (“Certainly, in some circumstances an applicant’s failure to meet the definition of ‘disabled’ is so apparent that video surveillance alone would be sufficient.”).

However, many courts are reluctant to rely solely upon surveillance. This reluctance is expressed in many ways in the rulings. Some courts comment upon the limited time under which a claimant is under surveillance. Cross v. Metro. Life Ins. Co., 292 F. App’x 888, 894 (11th Cir. 2008) (The surveillance tapes “were mere snapshots of [Plaintiff’s] activities over the course of several days.”). Other courts are reluctant to rely on surveillance where the claimant’s statements of disability are not definitive or the surveillance is not inconsistent with limited activities the claimant contends he is able to perform. See Morgan v. Unum Life Ins. Co. of Am., 346 F.3d 1173, 1178 (8th Cir. 2003). Other courts are reluctant to rely upon surveillance where the claimant’s treating physician continued to insist on disability. Mennenoh, 302 F. Supp. 2d at 988.

The weight given to surveillance obviously depends on the amount and nature of the activity observed and the extent to which it contradicts claimed limitations or restrictions. Gross, 734 F.3d at 27.

The more the surveillance video contradicts the claimant’s express limitations, the more persuasive the surveillance video becomes. For example, in Tsoulas v. Liberty Life Insurance Company of Boston, 454 F.3d 69, 79 (1st Cir. 2006), the plaintiff claimed “she was unable to walk or stand without an assistive device such as a cane, wheelchair, or scooter, that she could not climb stairs, that her ability to drive a car was ‘very little,’ and that she could not go grocery shopping, carry groceries, or put them away.” Plaintiff also claimed that she “spent 14–18 hours in bed each day, that she ‘never’ left the house on weekends or went shopping at the mall, that she went outdoors only in “summers and fall,” and that her daily routine consisted of showering, eat-
ing meals, resting, writing emails, and watching television.” *Id.* However, surveillance showed her “standing, walking, and driving without assistance, shopping for groceries, and lifting groceries into her car . . . [and that she] drove, stood, and walked unassisted as she went to a bank and a coffee shop and visited a beauty salon . . . . [and] drove from Bangor to Portland [with her boyfriend] for a multi-day trip during which she went to restaurants and nightclubs, and to a mall.” *Id.*

In *Conti v. Equitable Life Assurance Society of the United States*, 227 F. Supp. 2d 282, 285 (D. N.J. 2002), the plaintiff alleged that he sustained an injury to his cervical spine that resulted in physical symptoms that precluded him from performing his work as a chiropractor. However, surveillance video depicted him playing golf as well as hitting as many as 80 to 100 balls at the driving range. *Id.* at 286. Indeed, he apparently did not play particularly well as the court made a point of noting that he took many divots. *Id.* at 289. The court noted the IME physician had observed “it’s only fair to state that the frequent and repetitive activities Dr. Conti performs, during his many rounds of golf and visits to the driving range, would put a far greater load on his neck than performing the usual and customary duties of a chiropractor.” *Id.* at 287.

In *Minutello v. Hartford Life and Accident Insurance Company*, 964 F. Supp. 2d 491, 509 (W. D. Penn. 2013), the plaintiff claimed she could never lift objects weighing more than 10 pounds but yet was observed on surveillance video to be “lifting a large desk [with her daughter] and carrying it into a garage.”

In contrast, surveillance that showed the claimant driving his car, eating lunch at a restaurant, carrying light objects, sitting and reading, stretching and doing light aerobic exercise “revealed nothing new” in comparison to the claimed limitations that he spent time each day doing light reading and sitting on a patio, stretching and doing light aerobic exercise at a gym including riding a stationary bike, cycle, using light weights, and walking. *Morgan*, 346 F.3d at 1176, 1178.

In *Tsoulas*, *Conti*, and *Minutello*, the plaintiffs exaggerated their limitations, taking an extreme position on the extent and effect of their alleged physical conditions while in *Morgan*, the plaintiff did not claim to have a disability that affected all aspects of his life. The more extreme or exaggerated the position, the more likely favorable surveillance will have a significant impact on the case.

However, in many of the cases, it was the combination of the surveillance together with correlating medical evidence that proved to be persuasive. Accordingly, consideration should be given to the use of surveillance in disability insurance disputes in one or more of the following ways to bolster your case:

1. Submission of pertinent portions of the surveillance video to treating physicians during the claim process with specific questions referenced to their findings (e.g., Are the claimant’s activities as shown on the video consistent with what he told you in his examinations? Would someone who could perform the tasks shown on the surveillance video be capable of sedentary work?);
2. Submission of the pertinent surveillance video to in-house reviewing physicians to incorporate into their findings and conclusions;
3. Submission of the pertinent surveillance video to outside medical and/or vocational experts to incorporate into their findings and conclusions;
4. Use of the surveillance video at deposition or at trial with the plaintiff; and,
5. Use of the pertinent surveillance video at deposition or trial with plaintiff’s experts.

The more surveillance and the longer the period of time in which a claimant is observed, the more effective the surveillance video. Isolated clips of surveillance video are easy for the plaintiff to distinguish, particularly if the plaintiff has not taken a definitive or extreme position as to the extent of his limitations.
II. Conclusion

When coupled with expert medical and/or vocational testimony, surveillance is powerful evidence, disproving a plaintiff’s claimed limitations but also establishing the plaintiff’s ability to perform the duties of his or her occupation or other suitable occupations.