VOL. 28, NO. 2 SUMMER 2015

BENEFITS LAW JOURNAL

Hearsay and Video Surveillance in ERISA Long-Term Disability Cases

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In *Black & Decker Disability Plan v. Nord,*[1] the US Supreme Court held that although a plan administrator could not give special deference to the opinions of treating doctors in disability benefit disputes, plan administrators must still base their findings on "reliable evidence."[2] As one commentator has observed, "that begs the question of what constitutes reliable evidence."[3] This article discusses two of the areas of ERISA benefits in which the reliability of evidence is at issue: hearsay testimony and video surveillance.

HEARSAY[4]

There is unanimity among the courts that "the administrative review conducted by the trustee in an ERISA case is not a trial and the trustees are not bound to follow the Federal Rules of Evidence[5] and a plan administrator can consequently consider hearsay evidence.[6] One of the clearest statements on this issue is found in *Bigley v. Ciber, Inc. Long Term Disability Plan*:[7]

> Likewise, plaintiff's position that the administrative record contains certain inadmissible hearsay reflects counsel's continuing

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> failure to understand the procedure in an ERISA case. The administrative record is what it is. If it contains hearsay that would be inadmissible in a court of law under the Federal Rules of Evidence, so be it. The rules of evidence do not apply to what the plan or a third party administrator may consider in evaluating a long term disability claim. If they rely on unreliable evidence, then that could and should be considered by the reviewing court in making a determination as to whether to affirm or reverse the decision of the administrators. However, the court does not exclude evidence that is part of the record considered below.[8]

However, the fact that a plan administrator may consider hearsay evidence does not relieve it of its general responsibility to conduct a "full and fair review." As the US Court of Appeals for the Fifth Circuit indicated in *Pierre v. Connecticut General Life Insurance Company*, by itself, hearsay evidence cannot support a plan administrator's finding unless the evidence "meets certain indicia of reliability."[9] It indicated that if the only evidence supporting the plan administrator's decision was the statement by the murderer of the plaintiff's husband that she shot him in self-defense "unsupported by corroborating evidence, then the abuse of discretion standard would permit us to conclude that, because of the witness' self-serving interests, the decision to deny benefits, based on this statement without more, would be beyond the bounds of a reasonable judgment."[10] In *Truitt v. Unum Life Insurance Company of America*, the court explained that:

> "[I]n the context of ERISA, evidence is tested through a probing administrative process and that, in that process, issues of inauthenticity, contradiction, unreliability and bias all may be pertinent. This probing process contemplates that the plan administrator must first identify evidence to support its decision to deny benefits… Then the claimant may attempt to discredit that evidence by, among other things, attacking its source… And finally the plan administrator will consider whether, given its asserted deficiencies, the evidence in question continues to support the decision to deny benefits."[11]

Therefore, in cases in which there is no issue concerning the admissibility of hearsay evidence in the administrative record, courts will often backstop that statement by indicating why in the particular case, the plan administrator could accept the evidence as reliable.[12]

Although these principles are straight forward, counsel needs to be cognizant of the observation of the US Court of Appeals for the Third Circuit in *Luby v. Teamster Health Welfare and Pension Trust Fund*[13]:

> Administrators may be laypersons, appointed under the plan, sometimes without legal, accounting, or other training preparing them for the responsibility, often without any expertise in or understanding of the complex problems arising under ERISA, and, as the case demonstrates, little knowledge of the rules of evidence or legal procedures to assist them in fact finding.[14]

SURVEILLANCE

The ordering of video surveillance is viewed by some courts as an aggressive tactic, however, nothing prohibits its use,[15] nor is there anything " procedurally improper"[16] about the use of surveillance. Courts have indicated that the use of video surveillance to observe a benefit claimant and document a claimant's abilities[17] is reasonable[18] and also a proper method of investigating disability claims,[19] including potentially fraudulent ERISA claims.[20] Other courts have stated that a plan administrator may rely on video surveillance to assist in the determination of eligibility,[21] and that video surveillance has "great utility" for verifying many components of subjective self-reporting.[22] Thus, as a general proposition, video surveillance may be properly considered in making a decision to deny benefits to a claimant.[23] Although the issue of whether video surveillance is truly probative of whether a claimant qualifies for disability benefits is fact specific,[24] courts have indicated that the weight to be given to surveillance evidence depends on both the amount and nature of the activity observed,[25] and the probative value of a videotaped depiction of a claimant's activities depends on what those depictions demonstrate in relation to the administrative record as a whole.[26] In *Solnin v. GE Group Life Assurance Company*,[27] the federal district court indicated that "although video surveillance tape may be instructive in comparing a claimant's behavior with his reported limitations,[28] the information gleaned is not necessarily dispositive on its face and must be considered within the context of the particular case."[29] Consequently, even if surveillance does not provide objective proof of a claimant's disability, and it is debatable how much weight to give to the surveillance video, it must be given some weight.[30] While an overreliance on video surveillance alone may be arbitrary and capricious,[31] as exemplified in *Osburn v. Auburn Foundry*,[32] surveillance evidence may be used in conjunction with other medical evidence to support an administrator's decision to terminate benefits.[33] Expressed somewhat differently, cases relying upon surveillance to affirm a denial of benefits generally feature additional evidence to support a claimant's inability to work.[34] Further, even sporadic evidence capturing limited activity may be used to uphold a termination of benefits, particularly when the evidence shows a claimant engaging in activity that specifically contradicts his or her claim as to the manner in which he or she spent his or her time and what activities that he or she could tolerate.[35]

As an extreme case, in *McGarrah v. Hartford Life Insurance Company*, a claimant who was disabled from working as a truck driver because of a herniated disc was videotaped moving around unimpaired, including unloading furniture.[36]

An error that plan administrators sometimes make in determining whether disability benefits should be denied or discontinued is extrapolating from the video surveillance without focusing on the narrow issue before them. That is, the fact that a claimant performed certain tasks on a video for a brief period of time does not necessarily indicate that he or she could perform them repeatedly as part of the duties of a daily occupation.[37] Again, the context is critical. As the US Court of Appeals for the Second Circuit stated in *Balsamo v. Chater*:[38]

> [W]hen a disabled person gamely chooses to endure pain in order to pursue important goals, such as attending church and helping his wife on occasion go shopping for their family, it would be a shame to hold this endurance against him in determining benefits unless his conduct truly showed that he is capable of working.

In some instances, the activities shown on the surveillance footage are consistent with the claimant's subjective complaints and self-reported limitations,[39] or are uninformative,[40] or inconclusive,[41] or are "so thin and outdated that the administrator could not reasonably rely on them,"[42] or cannot refute the claimant's claims that he or she cannot function after overexertion;[43] or show claimant engaging in activities not outside the norm of his or her daily activities.[44] Other cases have held that a plan administrator abuses its discretion when it terminates a claimant's benefits based upon footage demonstrating his or her ability to engage in minimal activities over brief periods of time.[45]

However, although the length of a surveillance video is a relevant consideration, there are no bright line rules in this area. Thus even limited video surveillance may be sufficient to demonstrate functional abilities that are inconsistent with a claimant's subjective reported disabilities.[46] The surveillance videos serve two purposes: they can call into question a claimant's credibility by contradicting his self-reporting of symptoms and limitations[47] (although inconsistencies between a claimant's self-reported limitations and activities shown on a surveillance video do not establish that the claimant was capable of gainful employment,[48] and there is no authority that benefit termination is reasonable so long as a claimant exaggerates his or her symptoms);[49] and refuting a treating physician's assertion that a claimant is incapable of engaging in these activities.[50] Thus, when a surveillance video indicates that a claimant's physical limitations do not match either the claimant's own description of his or her activities or the opinions of his or her treating physician,[51] courts have been reluctant to deem a defendant's denial

of benefits arbitrary and capricious,[52] although, as was true of hearsay testimony, courts may seek out other evidence in addition to the surveillance videos in upholding a denial of benefits by a plan administrator.[53]

CONCLUSION

In making long-term disability determinations, it is appropriate for plan administrators to take into account both hearsay testimony and video surveillance. Even when operating under an arbitrary and capricious or abuse of discretion standard of review, however, hearsay testimony and video surveillance will rarely be sufficient in and of themselves to constitute substantial evidence upon which disability benefits can be denied or terminated. Therefore, when possible, plan administrators should seek out additional documentation to show that the hearsay testimony was reliable and corroborating the evidence of the video surveillance such as by the testimony of physicians and functional evaluations.

NOTES

1. 538 U.S. 822 (2003).

2. *Id*. at 834.

3. *See* Mark DeBofsky, "Disability Insurance Under Insurance Law: Economic Security or Litigation Nightmare," 2007 *Journal of Insurance Regulation*, 33, 48 (2007).

4. With respect to a judicial proceeding, hearsay is an out of court assertion, other than one made by the declarant while testifying at a trial or hearing, introduced in court to prove the truth of the matter asserted. Fed. R. Evidence 801(c); *Steinberg v. Obstetrics-Gynecological and Infertility Group, P.C.,* 260 F. Supp. 2d 492 (D. Conn. 2003); *Spivey v. Lincoln National Life Ins. Co.,* 928 F.2d 409 (9th Cir. 1991). Generally, hearsay evidence is inadmissible (Fed. R. Evidence 802; *Rosenfeld v. Basquiat,* 78 F.3d 84, 89 (2d Cir. 1996)), unless it comes under one of the exceptions set forth in the Federal Rules of Evidence. *Henien v. Saudi Arabian Parsons Ltd.,* 818 F.2d 1508, 1512 (9th Cir. 1987) *cert. den*. 484 U.S. 1009 (2008), quoted in *Spivey v. Lincoln National Life Ins. Co.,* 928 F.2d 409 (9th Cir. 1991). This portion of the article concerns only the treatment of hearsay at the plan level.

5. *Brown v. Board of Trustees of Bldg Services 32 B-J Pension Fund,* 392 F. Supp. 2d 434, 436 (E.D.N.Y. 2005); *Karr v. National Asbestos Workers Pension Fund,* 150 F.3d 812, 814 (7th Cir. 1998) ("A pension or welfare fund trustee or administrator is not a court. It is not bound by the rules of evidence"); *Pierre v. Connecticut General Life Ins. Co.,* 932 F.2d 1552, 1562 (5th Cir. 1991); *Helton v. ACS Group,* 964 F. Supp. 1175, 1177, fn. 2 (E.D. Tenn. 1997); *Lawrence v. Westerhaus,* 606 F. Supp. 275, 278 (E.D. Mo. 1984); *Speciale v. Blue Cross Blue Shield Association,* 538 F.3d 615 fn. 4 (7th Cir. 2008); *Cusson v. Liberty Life Assurance Company of Boston,* 592 F.3d 204 (1st Cir. 2010); *Johnson v. Bell South Long Term Disability Plan for Non-Salaried Employees,* 2006 WL 2092273 (M.D. Fla. July 26, 2006); *Erdahl v. Liberty Life Assurance Company of Boston,* 2013 WL 5838676 (D. R.I. October 30, 2013); *Spectrum Health v. Good Samaritan Employee Association Inc. Trust Fund, et al.,* 2008 WL 2484598 (W.D. Mi. June 18,

2008); *McGuire v. Hartford Life Accident Insurance Company,* 2006 WL 2773441 [*pg 3], fn. 2 (N.D. Ohio September 25, 2006); *Berg v. BCS Financial Corporation,* 2006 WL 273541, fn. 20 (N.D. Ill. February 2, 2006); *Black v. Long Term Disability Insurance,* 582 F.3d 738, 746 fn. 3 (7th Cir. 2009); *McGraw v. Metropolitan Life Ins. Co.,* 2014 WL 4443487, fn. 38 (E.D. La. September 9, 2014); *Rice v. ADP Totalsource, Inc.* 2013 WL 1286679 (N.D. Ill. March 28, 2013); *Pine v. First Unum Life Ins. Co.,* 2013 U.S. Dist. LEXIS 5158080 [p 63] (W.D. Pa. November 5, 2013), cited in *Verme-Gibboney v. The Hartford Life and Accident Insurance Company,* 2014 WL 1050618, n. 7 (D. N.J. March 13, 2014); *Bigley v. CIBER, Inc. Long Term Disability Coverage,* 570 Fed. Appx.756 (10th Cir. 2014); *Militello v. Central State SE & SW Areas Pension Fund,* 209 F. Supp. 2d 923 (N.D. Ill. 2002); *Louis v Genworth Life and Health Insurance Co.,* 2008 WL 4450284 at [*pg 7] (D. Mass. September 30, 2008).

6. As a practical matter, it would be difficult to handle many ERISA claims without hearsay evidence. *Pierre, supra* n.5*; Brown, supra* n.. *See, for example, Herman v. Hartford Life and Accident Ins. Co.,* 508 F.3d Appx. 933, 2013 WL 530836 (11th Cir. 2013); *Steele v. Life Insurance of North America,* 2006 WL 44310 (C.D. Ill. January 9, 2006); *Gernes v. Health and Welfare Plan of Metropolitan Cabinet*, 2012 WL 163015, fn. 13 (D. Mass., January 19, 2012); *Huffstutler v. Goodyear Tire and Rubber Company,* 2012 WL 4344735 (N.D. Ala. Sept. 17, 2012); *Black, supra* n.5; *Null v. Community Health Assn.,* 379 Fed. Appx. 704, 706 (10th Cir. 2010); *Adair v. El Pueblo Boys and Girls Ranch, Inc. Long Term Disability Plan,* 2013 WL 4775927, 2013 BL 237588 (D. Colo. Sept. 5, 2013). Of course, a plan administrator can also assert that the evidence in question does not constitute hearsay. *See Kiley v. Travelers Indem. Co.,* 853 F. Supp. 6, 9, n.2 (D. Mass. 1994) (noting that physician's letter in an ERISA case is not hearsay because it was offered as the basis of the administrators benefit denial, and not for the truth of its content): *Bonnano v. Blue Cross and Blue Shield of Mass. Inc.,* 2011 WL 4899902, fn. 9 (D. Mass October 4, 2011); *Gernes v. Health and Welfare Plan of Metropolitan Cabinet* (administrative record is relevant not for the truth of the matter asserted but rather whether the administrator's action on the record before him was unreasonable). This position may be a one-way ratchet, because a plan administrator is not obligated to consider hearsay offered by claimants. *See Kingsbury v. Marsh & McLennan,* 2011 WL 344746, n.2 (D. Mass. Feb. 1, 2011) (also noting that plaintiff's affidavit constitutes double hearsay and suggests the statement may therefore be unreliable). Although the law in this area is clear, it is interesting to compare these cases with a Wisconsin Supreme Court case, *Gehin v. Wisconsin Group Ins.* Bd., 2005 WI 16, 278 Wis. 2d 111, 692 NW 572 (Wis. 2005), in which the Wisconsin Supreme Court held that, notwithstanding the decision of the US Supreme Court in *Richardson v. Perales,* 402 U.S.389 (1971), under Wisconsin law uncorroborated hearsay medical evidence may not sustain a denial of disability benefits even in an administrative setting because:

> The harm to plaintiffs in having their income continuance insurance benefits terminated on the basis of contraverted written hearsay medical reports, without the opportunity to cross-examine the authors of those reports, exceeds the burden on the Group Insurance Board to call a witness to corroborate their hearsay medical report.

Gehin is discussed in Mark D. DeBofsky's "Disability Insurances under the ERISA Law: Economic Security or Litigation Nightmare," 2007 *Journal of Insurance Regulation* 33, 45, and "What Process is Due in the Adjudication of ERISA Claims," 40 *John Marshall Law* 811, 831 (2007).

7. 2012 WL 5494660 (D. Colo. November 13, 2012), aff'd 570 Fed. Appx. 756 (10th Cir. 2014).

8. *Id*. at [pg. *6] quoted in *Koloff v. Metropolian Life Ins. Co.,* 2014 WL 3420990, fn.6 (E.D. Cal. July 14,2014).

9. 932 F.2d. 1552, 1563 (5th Cir. 1991). *See also Pierre, supra* n.5 ("To determine whether hearsay evidence may constitute substantial evidence in support of a decision…the reviewing court must look to factors establishing underlying reliability and probative weight.") *Trahan v. Bell South Telecommunications, Inc*., 847 F. Supp. 54 (W.D. La. 1994). For an example of an inadequate investigation, see *James v. Louisiana Laborers Health and Welfare Fund,* 1993 WL 205095 (E.D. La. June 9,1993) ("a reasonable plan will do more than make weak inferences from paltry and ambiguous evidence"). The distinction between taking an item of evidence into account and basing a decision upon that item is not restricted to ERISA claims. *See* B. Schwartz, *Administrative Law Treatise* 7.4 at 376 (3rd Ed. 1991) ("There is a fundamental distinction between the admission of incompetent evidence and reliance upon it in reaching a decision."), quoted in Marc Debofsky, "What Process is Due in the Adjudication of ERISA Claims," 40 *John Marshall Law Rev.* 811, 831, fn. 104 (2007).

10. 932 F.2d. 1552, 1563. Although consideration of hearsay by a plan administrator is not improper, "second step declarant evidence may or may not be sufficient to uphold a determination under an ERISA plan." *School Board of Broward County v. Dept. of Health Education and Welfare,* 525 F.2d 900, 906 (5th Cir. 1976), citing *Richardson, supra* n.6; *Reilly v. Blue Cross & Blue Shield United of Wisconsin,* 846 F.2d 416, 423–24, cert. den. 488 U.S. 856 (1988); Pierre v. Connecticut General Life Insurance Company of North America. Thus, in *Pierre*, the murder suspect's self-serving statement that she shot Pierre in self-defense was corroborated by a detective's report, the death certificate, and a private investigator's report, which was based upon police records and photographs.

11. 729 F.3d 497 (5th Cir. 2013). *James, supra* n.9; *see also Wade v. Hewlett Packard Development Co., L.P.,* 2005 WL 3005628 (S.D. Tex. November 8, 2005) at [pg 4] ("If the Plan Administrator bases its determination upon a statement the identity of the person making the statement, his or her reliability and the context in which the statement was made are all relevant factors for the reviewing court to consider" quoted in *Torres v. Liberty Life Assurance Company of Boston,* 2014 WL 4075937 (E.D. Tex. August 14, 2014).

12. *See,* for example, *Null v. Community Hospital Assn*., 379 Fed Appx 704, 706 (10th Cir. 2010) (plan administrator can rule on hearsay if it is reasonably reliable). *Adair, supra* n.6; *Johnson, supra* n.5 ("there are sufficient indicia of reliability on the reviewing physician's iterations of these conversations"); *Trahan, supra* n.9 (while witness' hearsay testimony by itself may not have been sufficient, there was corroborating evidence); *Blair v. Metropolitan Life Insurance Co.,* 955 F. Supp. 2d 1229 (N.D. Ala. June 28, 2013), *aff'd* 2014 WL 2809138 (11th Cir. June 23, 2014) ('Mr. Phillips statement that Dr. Just did not disagree when she suggested that plaintiff was not disabled appears to be sufficient and reliable"); *McGinn v. Metropolitan Life Ins. Co*. 2014 WL 4443487 (E.D. La. September 9, 2014) (the alleged hearsay statement was made directly to Met Life in response to Met Life's inquiry, and the statement was corroborated by Dr. DeVille's opinion); *Torres, supra* n.11; *Gulf South Medical and Surgical Institute v. Aetna Life Ins. Co.,* 39 F.3d 520 (5th Cir. 1994) (hearsay MRI reports provided a reliable indication of the basis of Aetna's decision and was properly considered by the district court in determining whether Aetna abused its discretion); *Truitt v. Unum Life Ins Co. of America,* 729 F.3d 497 (5th Cir. 2013) (conversational emails met certain indicia of reliability, facial authenticity, a time line consistent with claimant's file, and either acknowledged by her or only indirectly disavowed; Unum's decision to credit the emails was not beyond the bounds of a reasonable judgment). Compare *Null v. Community Hospital Assn*. (hearsay evidence is reasonably reliable), with *Adair, supra* n.6 (reports of

Dr. Ramos' statements in the telephone conversation appear to directly conflict with or seriously call into question Dr. Ramos' actual written opinion).

13. 944 F.2d 1176 (3rd Cir. 1991).

14. *Id.* at 1183.

15. *Post v Hartford Ins. Co.,* 501 F.3d 154, 166–67 (3rd Cir. 2007); *Moros v. Connecticut General Life Insurance Co.,* 2014 WL 323249 (E.D. Pa. January 29, 2014). Note, however, that in *Dishman v. Unum Life Insurance Company of America,* 269 F.3d 974 (9th Cir. 2001), the court of appeals held that a state law claim for tortuous invasion of privacy was not preempted. This article, however, does not address preemption issues in connection with claims for unreasonable surveillance and invasion of privacy. For an illustrative case discussing such issues, see *Dreczka v Hartford Life & Accident Ins. Co.,* 2013 WL 1148899 (E.D. Wisc. March 9, 2013). For other ERISA cases in which it was alleged that the surveillance constituted an invasion of privacy, see *Montour v. Hartford Life & Accident Insurance Co.,* 588 F.3d 633 (9th Cir., November 19, 2009) (invasion of privacy claim remanded to state court); *Pappa v. Unum Life Insurance Company of America,* 2008 WL 744820 (M.D. Pa. March 18, 2008) (alleged surveillance through bedroom and bathroom window a violation of Pennsylvania law); *Finley v. Hartford Life and Accident Insurance Co.,* 2007 WL 4374417 (N.D. Cal. December 19, 2007), *aff'd* 400 Fed. Appx. 198 (9th Cir. 2010) (surveillance through kitchen window not a violation of California privacy law). *Pappa v. Unum Life Insurance Company of America* also is noteworthy, because plaintiff alleged RICO claims, all of which the district court dismissed.

16. *Hertz v Hartford Life and Accident Insurance Company,* 991 F. Supp. 2d 1121 (D. Nev. 2014); *Kurth v. Hartford Life and Accident Ins. Co.,* 895 F. Supp. 2d 1087 (C.D. Cal. 2012); *Delta Family Care Disability and Survivorship Plan v. Marshall,* 258 F.3d 834, 841 (8th Cir. 2001); *Williams v. Hartford Life and Accident Insurance Co.,* 2013 WL 1336228 (D. Utah March 29, 2013).

17. *Utley v. Provident Life & Accident Ins. Co.,* 2007 WL 925729 (E.D. Mich. March 26, 2007); *Turner v. Delta Family Care Disability and Survivorship Plan,* 291 F.3d 1270, 1274 (11th Cir. 2002); *Briggs v. Marriott International,* 368 F. Supp. 2d 461, 471 (D. Md. 2005); *DeLorenzo v. Hartford Life,* 2006 WL 485119 (M.D. Fla. February 28, 2006).

18. *Cusson, supra* n.5; *Green v. Union Security Ins. Co.,* 646 F.3d 1042 (8th Cir. 2011); *Frerichs v. Hartford Life and Accident Ins. Co.,* 875 F. Supp. 2d 923 (D. Minn. 2012).

19. *Eppley v. Provident Life and Accident Insurance Co.,* 789 F. Supp. 2d 546, 573 (E.D. Pa. 2011); *Muritello v. Hartford Life and Accident Ins. Co.,* 2013 WL 4053144 (W.D. Pa., August 12, 2013); *Russell v. Paul Revere Life Ins. Co.,* 288 F.3d 78, 81 (3rd Cir. 2002); *Keany v. Aetna Life Ins. Co.,* 2006 WL 293493 at [*p.8] (E.D. Pa. February 6, 2006);*Verme-Gibboney v. Hartford Life,* 2014 WL 1050618 (D. N. J. March 3, 2014); *Mozdzierz v. Aetna Life Ins. Co.,* 2014 WL 7177326 (E.D. Pa. December 17, 2014).

20. *Bolt v. Honeywell Intl.,* 814 F. Supp. 2d 913 (D. Ariz. 2011); *LaCour v. Life Insurance Company of North America,* 200 F. Supp. 2d 622, 626 (W.D. La. 2002); *Mote v. Aetna Life Ins. Co.,* 502 F.3d 601, 609-610 (7th Cir. 2007); *Giertz-Richardson v. Hartford Life and Accident Ins. Co.,* 536 F. Supp. 2d 1280, 1282 (M.D. Fla. 2008).

21. *Lewandowski v. Companion Life Ins. Co.,* 2010 WL 3862719 (E.D. Mich. September 28, 2010); *Hanisch v. Hartford Life Ins. Co.,* 2008 WL 283714 (E.D. Mich. January 31, 2008); *Wu v. Liberty Life Assurance Co. of Boston,* 2006 WL 1521947 (W.D. Mich. May 31, 2006).

22. *Kiloh v. Hartford Life Ins. Co.,* 2005 WL 2105957 [*p.13] (M.D. Fla. August 31, 2005), quoted in *Bloom v.* Hartford *Life and Accident Ins. Co.,* 971 F. Supp. 2d 1269 (S.D. Fla. 2013), *aff'd* 58 E.B.C. 1251, 2014 WL 840765 (11th Cir. March 5, 2014).

23. *Gupson v. Administrative Committee of Delta Air Lines,* 350 Fed. Appx. 389 (11th Cir. 2009); *Ruple v. Hartford Life and Accident Insurance Co.,* 340 Fed. Appx. 604, 608, 614 (11th Cir. 2008); *Howard v. Hartford Life and Accident Ins. Co.,* 929 F. Supp. 2d 1264 (M.D. Fla. 2013), *aff'd* 2014 WL 1465702 (11th Cir. April 15, 2014).

24. *Howard, supra* n.23.

25. *Marantz v. Permanente Medical Group, Inc. LTD Plan,* 687 F.3d 320, 329 (7th Cir. 2012); *Maher v. Mass General Hospital Long Term Disability Plan,* 665 F.3d 289, 295 (1st Cir. 2011); *Gross v. Sun Life Assurance Company of Canada,* 734 F.3d 1 (1st Cir. 2013); *Doe v. Unum Life Ins. Co.,* 2014 WL 3893096 (D. Mass. August 8, 2014).

26. *Eppley v. Provident Life and Accident Ins. Co.,* 789 F. Supp. 2d 546, 573–74 (E.D. Pa. 2011); *Minutello v. Hartford Life and Accident Ins. Co.,* 2013 WL 4053144 (W.D. August 12, 2013).

27. 2007 WL 923083 (E.D.N.Y. March 23, 2007).

28. *Billinger v. Bell Atlantic,* 240 F. Supp. 2d 274, 285 (S.D.N.Y. 2003), *aff'd* 124 Fed. Appx. 669 (2d Cir. 2005).

29. *Glockson v. First Unum Life Ins. Co.,* 2006 WL 1877140 at [*p.5] (N.D.N.Y. July 6, 2006).

30. *Gross, supra* n.25 (vacating and remanding for, *inter alia*, failing to make a contextualized assessment of surveillance footage); *Doe, supra* n.25.

31. *Claussen v. Standard Ins. Co.,* 961 F. Supp. 1446, 1457 (D. Colo. 1997); *Rigby v. Bayer Corp.,* 933 F. Supp. 628, 634–5 (E.D. Tex. 1996); *Osburn v. Auburn Foundry, Inc.,* 293 F. Supp. 2d 863 (N.D. Ind. 2003).

32. The district court in *Osburn* made the following critique of the plan administrator's analysis denying benefits:

> In short, Auburn reached the conclusion that a mentally retarded, illiterate, partially blind, partially deaf arthritic man with arteriosclerotic heart disease, thyroid insufficiency, and high blood pressure is capable of gainful employment, simply because he performed 1.5 hours of light physical tasks over the course of two days, and in spite of three medical reports finding total disability. This conclusion is "downright unreasonable."

33. *Bloom, supra* n.22; *Marantz, supra* n.25; *Green, supra* n.18 (video evidence need not clearly establish claimant's disability, but it provides another form of objective evidence upon which an ERISA administrator may make its claim determination); *Mozdzierz, supra* n. 19.

34. *Osburn, supra* n.31 at fn. 16; *Turner, supra* n.17; *Armstrong v. Liberty Mutual Life Assurance Company of Boston,* 273 F. Supp. 2d 395 (S.D.N.Y. 2003); *Bekiroglu v. Paul Revere Life Ins. Co.,* 223 F. Supp. 2d 361 (D. Mass. 2002); *Conti v. Equitable Life Assurance Society of the United States,* 227 F. Supp. 2d 282 (D. N.J. 2002); *Schindler v. Metropolitan Life Ins Co.,* 141 F. Supp. 2d 1073 (M.D. Fla. 2001); *Davis v. American General Life and Accident Ins. Co.,* 906 F. Supp. 1302 (E.D. Mo. 1995).

35. *Maher, supra* n.25; *Gross, supra* n.25 ("even limited surveillance is a useful way to check the credibility of individuals who claim disability benefits based on symptoms that are difficult to evaluate through objective tests."); *Bloom, supra* n.22 (two-day surveillance video produced sufficient evidence on which to deny benefits, because a claimant suffering frequent seizures would not drive an automobile 90 miles during that period).

36. 234 F.3d 1026, 1029 (8th Cir. 2000), discussed in *Solnin v GE Group Life Assurance Company,* 2007 WL 923083 (E.D.N.Y. March 23, 2007).

37. *Winter v. The Hartford Life and Accident Insurance Co.,* 309 F. Supp. 2d 409 (E.D.N.Y. 2004) (surveillance video alone [20 minutes, two days of activity] does not provide substantial evidence that claimant was not disabled); *Rapolla v. Waste Management Employee Benefits Plan,* 2014 WL 2918863 (N.D. Cal., June 25,2014) (claimant's ability to leave the house for a few hours a day does not mean he is capable of sitting at a desk and performing an office job); *Porca v. Prudential Ins. Co. of America,* 682 F. Supp. 2d 1057 (C.D. Cal. 2010); *Migliaro v. IBM Long Term Disability Plan,* 231 F. Supp. 2d 1167 (M.D. Fla. 2002) (videotaped surveillance does not illustrate that plaintiff can function at a sedentary job away from his home); *Hunter v. Life Ins. Co. of N.A.,* 2011 WL 2566357 (6th Cir. June 29, 2011) (although surveillance video indicated a discrepancy between Hunter's stated and observed functionality, the inconsistencies were relatively minor and did not demonstrate that plaintiff could perform all of the duties of his occupation); *Wilson v. Life Ins. Co. of North America,* 424 F. Supp. 2d 1146, 1157, fn.6 (D. Nebr. 2006) ("Nothing in the record comes close to establishing that [the claimant's] activities of daily living could reasonably be equated with the demands of a full-time job"); *Adair, supra* n.6 (surveillance video may indicate that claimant can perform tasks, but not perform them eight hours a day, five days a week on a consistent basis as is required for full-time work); *Osborne v. Hartford Life and Accident Ins. Co.,* 2012 WL 4088704 (W.D. Va. September 17, 2012) (a two-hour video segment of a surveillance video revealed some discrepancies between claimed and observed functionality; however, it did not provide substantial evidence that the claimant was performing medium level work on a full-time basis); *Lalli v. Hartford Life Ins. Co.,* 2012 U.S. Dist. LEXIS 1523312 at [*p.25], 2012 WL 602740 (D. Utah February 23, 2012) (surveillance footage of a doctor playing golf did not did not justify a denial of disability payments because "four and a half hours of golf does not equate to a full 8 hour work day"), quoted in *Osborne*; *Clark v. Metropolitan Life Ins. Co.,* 2006 WL 3505999 (S.D. Ohio, December 4, 2006); *Hanisek v. Hartford Life Ins. Co.,* 2008 WL 283714 at [*p.4] [E.D. Mich. January 31, 2008) (a surveillance video of claimant walking 30 minutes, operating a car, and performing other small tasks "fail to show plaintiff either performing any single or combination of activities for an eight…hour period".), quoted in *Hunter v. Life Ins. Co. of NA,* 2011 WL 2566357 (6th Cir. June 29, 2011); *Beaty v. Prudential Ins. Co. of America,* 313 Fed. Appx. 46, 49 (9th Cir. 2009) (a court should not draw an "insupportable inference" from surveillance footage or reports that indicate that a plaintiff can perform normal daily activities by failing to consider how these activities demonstrate that he or she can perform the duties of his or her occupation), quoted in *Watts v. Metropolitan Life Ins Co.,* 2011 WL 1585000 (S.D. Cal. April 26, 2011); *Frerichs, supra* n.18 (video surveillance does not show plaintiff engaged in the activities for which he claims long-term disability benefits—the inability to perform the essential duties of a dentist); *Montour v. Hartford Life & Acc. Ins. Co,* 588 F.3d 623, 633 (9th Cir. 2009) (although plaintiff could perform sedentary activities in bursts spread out over four days, it did not indicate that he was capable of sustaining activity in a full-time occupation.); *Glockson v. First Unum Life Ins. Co.,* 2006 WL 1877140 at [p.7] (N.D.N.Y. July 6, 2006) ("reliance on snapshot evaluations like surveillance is logically suspect in assessing conditions which result in debilitating pain and/or fatigue following periods of activity"); *Solnin v. GE Group Life Assurance Co.,* 2007 WL 923083 (E.D.N.Y. March 23, 2007) (fact that claimant engaged in a few hours of activity on three separate days did not belie evidence that she could not perform sedentary work).

38. 145 F.3d 75, 81 (2d Cir. 1998).

39. *Chellman v. Karen Foundation Health Plan,* 2009 WL 3651567 (9th Cir. 2009); *Bloom, supra* n.22; *Marantz, supra* n.25; *Bertelsen v. Hartford Life Ins. Co.,* 1 F. Supp. 3d 1060 (E.D. Cal. 2014); Montour v. Hartford Life and Accident Ins. Co.

40. *Moros, supra* n.15; *Cf. Morgan v. Unum Life Ins. Co. of America,* 346 F.3d 1173, 1178 (8th Cir. 2003) (video surveillance of a claimant's activities not substantial evidence because insurer was previously aware that the claimant routinely engaged in the type of activity observed), quoted in *Green, supra* n.18.

41. *Rapolla, supra* n.37.

42. *Cook v. Liberty Life Assurance Co. of Boston,* 320 F.3d 11, 15 and 23 (1st Cir. 2003) (administrator relying on claimant showing real estate on two Sundays to discontinue benefits), discussed in *Doe, supra* n.25.

43. *Hanusik v. Hartford Life Ins. Co.,* 2008 WL 283714 at [*pg 4] (E.D. Mich., January 31, 2008), quoted in *Lewandowski v. Companion Life,* 2010 WL 3862719 (E.D. Mich. September 28, 2010).

44. *Frerichs, supra* n.18; *Groez-Salomon v. Paul Revere Life Ins. Co.,* 1999 WL 33244979 [*p.6] (C.D. Cal. February 4, 1999) (noting that the video surveillance did not show the context of plaintiff's life).

45. *Minutello, supra* n.26; *Dorsey v. Provident Life & Accident Ins. Co.,* 167 F. Supp. 2d 846, 856 (E.D. Pa. 2001); *Marziale v. Hartford Life and Accident Ins. Co.,* 2002 WL 1359639 [*pg 7] (E.D. La. June 20, 2002) (videotape surveillance of less than two hours over a 48-hour period insufficient to demonstrate that defendant acted within its discretion in the face of strongly contradictory evidence) cited in *Toth v. Automobile Club of California LTD Plan,* 2005 WL 1877150 (C.D. Cal. January 27, 2005); *Claussen v. Standard Ins. Co.,* 961 F. Supp. 1446, 1457 (D. Colo. 1997); *Gessling v. Group Long Term Disability Plan for Employees of Sprint/United Management Company,* 693 F. Supp. 2d 856 (S.D. Fla. 2010) (less than nine minutes of minimal movement over the course of four days of observation); *Osburn, supra* n.31 (one-and-one-half hours of surveillance over two days); *Soron v. Liberty Life Assurance Co.,* 2005 WL 1173076 at [*p.11] (N.D.N.Y., May 2, 2005) (isolated activities for brief periods of time with no revelation of consequences); *Cross v. Metropolitan Life Ins. Co.,* 292 Fed. Appx. 888, 892-94 (11th Cir. 2008) (five days of surveillance resulting in two hours of video surveillance produce a "mere snapshot" of plaintiff's activities and failed to take account of the impact of these activities upon plaintiff); *Hertz, supra* n.16 (40 hours of surveillance over four days, but only 11 minutes of footage were presented). *Cf. Toth v. Automobile Club of California Long Term Disability Plan* (tape recording of four hours of activity over a 72-hour period not a compelling basis for denying benefits).

46. *Dolan v. Prudential Ins. Co. of America,* 2012 WL 1669371 [*p.13] (N.D. Cal. May 11, 2012); *Fisher v. Continental Casualty Co.,* 2012 WL 3100560 (D. Mont. July 30, 2012); *Bender v. Hartford Life Ins. Co.,* 2011 WL 3566483 [*p. 14] (N.D. Cal. August 12, 2011). *See also Tsoulas v. Liberty Life Assurance Co.,* 454 F.3d 69, 77 (1st Cir. 2006) (no abuse of discretion when Liberty considered surveillance video consisting of four hours per day for three days, even though that evidence represented only a "small-impliedly non-representative-fraction of a day"); *Denmark v. Liberty Life Assurance Co.,* 481 F.3d 16, 38 (1st Cir. 2007), vacated on other grounds 566 F.3d 1 (1st Cir. 2009) (not arbitrary and capricious for Liberty to consider reports and photography from four days of surveillance that showed the claimant outside for short periods of time on two of the four days).

47. *McKeoun v. Unum Life Insurance Company of America,* 2013 WL 4501183 (E.D. La. August 21, 2013); *Fernandez v. Hartford Life and Accident Ins. Co.,* 2014 WL 1308351(E.D. Mich. March 28, 2014) (surveillance videos "completely contradict [plaintiff's] claim of limited functionality"); *Utley v. Provident Life & Accident Ins. Co.,* 2007 WL 925729 (E.D. Mich. March 26, 2007); *Schindler, supra* n.34; *Cusson, supra* n.5; *Ray v. SunLife Health Ins. Co.,* 752 F. Supp. 2d 1229 (N.D. Ala. 2010); *Turner,*

supra n.17; *Finley, supra* n.15; *Onfrieti v. Metropolitan Life Ins. Co.,* 320 F. Supp 2d 1250 ((M.D. Fla. 2004); *Palma v. Harleyville Life Ins. Co.,* 2013 WL 6840512 (D.N.J. December 20, 2013); *Mote v. Aetna Life Ins. Co.,* 502 F.3d 601, 609 (7th Cir. 2007); *Howard v. Hartford Life and Accident Insurance Company,* 2014 WL 1465702 (11th Cir. April 15, 2014) (claimant's credibility was "seriously called into question by the surveillance video which shows her engaging in activities grossly inconsistent with her description of her abilities, and in stark contrast to her own treating physician's assessments.")

48. *Clark, supra* n.37.

49. *Osburn, supra* n.31.

50. *Vlass v. Raytheon Employees' Disability Trust,* 244 F.3d 27, 31–32 (1st Cir. 2001); *Minutello, supra* n.26.

51. Note that a treating physician may be less likely to question a participant's self-reporting than a plan administrator. As the US Court of Appeals for the Seventh Circuit commented in *Leipzer v. AIG Life Ins. Co.*, 362 F.3d 406, 409 (7th Cir. 2007): ("Most of the time physicians accept at face value what patients tell them about their symptoms; but [administrators] must consider the possibility that applicants are exaggerating in an effort to win benefits (or are sincere hypochondriacs, not at serious medical risk).").

52. *DeLong v. Aetna Life Ins. Co.,* 2006 WL 328398 (E.D. Pa. February 9, 2006) *aff'd* 232 Fed. Appx. 190 (3rd Cir. 2007); *Eppley v. Provident Life and Accident Ins. Co.,* 2011 WL 1584075 (E.D. Pa. April 27, 2011); *Mozdzierz, supra* n.19.

53. *Minutello, supra* n.26; *McGarrah v. Hartford Life Ins. Co.,* 234 F.3d 1026, 1032 (8th Cir. 2000); *Patterson v. Caterpillar,* 70 F.3d 503, 505–06 (7th Cir. 1995); *Osburn, supra* n.31; *Thompson v. Liberty Life Assurance Co. of Boston,* 2007 WL 2783364 (D. N.H. September 24, 2007) (plan administrator could take into account surveillance video and opinions of non-treating physicians); *Macon v. Hartford Life & Accident Ins. Co.,* 2005 U.S. Dist. LEXIS 9908 (W.D. Ky. May 23, 2005) (termination of benefits because of videotaped activities and lack of objective medical evidence); *Ingravallo v Hartford Life and Accident Insurance Company,* 2014 WL 1622798, 58 E.B.C. 1508 (2d Cir. April 24, 2014) (while surveillance video alone might not constitute sufficient evidence, Hartford's determination was based upon far more); *Gannon v. Metropolitan Life Ins. Co.,* 360 F.3d 211, 213-15 (1st Cir. 2004) (surveillance video supported by a functional capacity evaluation (FCE) conducted by a physical therapist, the opinion of an independent medical consultant who viewed the claimant's file; a transferable skills analysis prepared by a vocational consultant; and a denial of a claim for Social Security benefits); *Agin v. Liberty Life Assurance Company of Boston,* 2006 WL 1722228 (W.D. Mich. June 21, 2006) (opinions of five physicians based in part upon video surveillance was sufficient); *Corvi v. Eastman Kodak Long Term Disability Plan,* 2001 WL 484008 (S.D.N.Y. May 8, 2001) (surveillance and other medical information showed that claimant was not totally disabled); *Eady v. American Cast Iron Pipe Company,* 203 Fed. Appx. 326 (11th Cir. 2006) (testimony of physicians bolstered by videotape surveillance); *Takata v. Hartford Comprehensive Employee Benefit Service Company,* 55 E.B.C. 1975, 2012 WL 4903857 (E.D. Wash. October 16, 2012), *aff'd* 58 E.B.C. 2420, 572 Fed. Appx. 447 (9th Cir. 2014) (opinion of physicians and functional assessments including the initial assessment of claimant's treating physician in addition to video surveillance).