UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

LINDA GRAVES, Plaintiff,

v. Civil Action No. 3:14-cv-558-DJH-DW

STANDARD INSURANCE COMPANY, Defendant.

* * * * *

MEMORANDUM OPINION AND ORDER

Plaintiff Linda Graves was insured under a long-term disability insurance policy issued by Defendant Standard Insurance Company to her employer. Graves brought this action against Standard after it stopped payments under the policy. (Docket No. 1-3; *see* D.N. 1) Graves's counsel has withdrawn from this matter, and Graves is now proceeding pro se. (D.N. 137; *see* D.N. 153) After Graves's counsel withdrew, he objected to an order of the magistrate judge imposing sanctions upon him for intimidating an opposing party's witness. (D.N. 145; D.N. 144) Standard then moved for summary judgment on Graves's state-law claims for breach of contract, breach of the duty of good faith and fair dealing, violation of the Kentucky Unfair Claims Settlement Practices Act, and violation of the Kentucky Consumer Protection Act. (D.N. 147) For the reasons discussed below, Graves's former counsel's objections will be overruled, and Standard's motion for summary judgment will be granted.

I. OBJECTIONS TO ORDER IMPOSING SANCTIONS

Before reaching the merits, the Court must address pending objections to the June 9, 2017 order of Magistrate Judge Dave Whalin imposing sanctions upon Graves's former counsel, Michael Grabhorn. (*See* D.N. 145; D.N. 144) The Court previously sanctioned Grabhorn and ordered him to pay Standard's "reasonable costs and fees attributable to the [motion for

sanctions] and the events leading up to the motion." (D.N. 72, PageID # 1563-64) Standard thereafter filed its bill of costs (D.N. 75), and Graves filed a response (D.N. 83). Judge Whalin ordered Grabhorn to pay Standard's attorney fees in the amount of $10,962. (D.N. 144, PageID # 2657) Grabhorn objects to Judge Whalin's order, asserting that sanctions were not warranted and that Judge Whalin's award is excessive. (D.N. 145)

Federal Rule of Civil Procedure 72(a) provides that the Court must "modify or set aside any part of the [magistrate judge's] order that is clearly erroneous or is contrary to law."[1] Fed. R. Civ. P. 72(a). "The magistrate judge's factual findings are reviewed under the clearly erroneous standard." *Blackwell v. Liberty Life Assurance Co. of Boston*, No. 3:15-cv-376-DJH, 2017 WL 927239, at *2 (W.D. Ky. Mar. 8, 2017) (quoting *Scott-Warren v. Liberty Life Assurance Co. of Boston*, No. 3:14-CV-00738-CRS-CHL, 2016 WL 5661774, at *3 (W.D. Ky. Sept. 29, 2016)). "Clear error exists 'when the reviewing court is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Max Trucking, LLC v. Liberty Mut. Ins. Corp.*, 802 F.3d 793, 810 (6th Cir. 2015)). "On the other hand, the magistrate judge's legal conclusions are reviewed under the 'contrary to law' standard." *Id.* (quoting *Scott-Warren*, 2016 WL 5661774, at *3). "A legal conclusion is contrary to law when it contradicts or ignores applicable legal principles found in the Constitution, statutes, and case precedent." *Id.* (quoting *Scott-Warren*, 2016 WL 5661774, at *3).

Grabhorn makes four arguments in his objections, and the Court will address each one in turn.

[1] The Court need not review de novo Judge Whalin's order imposing sanctions, as the sanctions imposed relate exclusively to a nondispositive pretrial matter. *See Massey v. City of Ferndale*, 7 F.3d 506, 510 (6th Cir. 1993) (holding that magistrate judge did not have authority to rule upon *post-dismissal* motions for sanctions); *cf. Boxer F2, L.P. v. Bronchick*, No. 16-1360, 2018 WL 503429, at *3 (10th Cir. Jan. 22, 2018) (noting that district courts must review de novo orders imposing sanctions only where they "effectively grant[] or dismiss[] a claim or defense").

A. Sixth Circuit Precedent Regarding Medical-Licensure Claims

Before addressing Grabhorn's first argument, the Court must revisit why it imposed sanctions in the first place. Standard hired Dr. Richard Semble, an orthopedic surgeon practicing in New York, to render a professional medical opinion as to whether Graves was able to engage in "substantial gainful activity." (D.N. 54, PageID # 1131) Graves then subpoenaed all documents in Dr. Semble's records referring or relating to her. (*Id.*, PageID # 1132) Dr. Semble's records custodian informed Grabhorn that no records were available because Graves had never been seen by Dr. Semble. (*Id.*) Grabhorn then sent Dr. Semble a letter stating that (1) any medical opinion concerning Graves could only be provided by a physician licensed in Kentucky; and (2) to avoid potential claims concerning his medical opinion, Dr. Semble should complete and return a declaration withdrawing his medical opinion. (*Id.*, PageID # 1133) This Court concluded that Grabhorn had attempted to intimidate an opposing witness and granted Standard's motion for sanctions on that basis. (D.N. 72, PageID # 1563)

Grabhorn now argues that he should not have been sanctioned because the legal theory on which he based these "potential claims"—that a doctor not licensed in Kentucky violates Ky. Rev. Stat. § 311.560 when he renders an opinion about a disability claimant's residual functional capacity after reviewing the claimant's medical records—has been found to be viable in the Sixth Circuit. (D.N. 145, PageID # 2659, 2661) Grabhorn relies on the Sixth Circuit's decision in *Hogan v. Jacobson*, 823 F.3d 872 (6th Cir. 2016), to support his argument. (*See id.*) In *Hogan*, the plaintiff brought an ERISA claim against her insurance company after it denied her claim for disability-insurance benefits. 823 F.3d at 877. After losing that case, she brought suit in state court against two nurses who worked for the insurance company and who had provided opinions regarding her eligibility for disability benefits after reviewing her claim. *Id.* Specifically, the

plaintiff argued that the nurses had committed negligence per se by giving medical advice without being licensed under Kentucky law. *Id.* The defendant nurses removed the case to this Court on the basis of ERISA's complete-preemptive effect, and the Court ultimately denied the plaintiff's motion to remand and granted the defendants' motion to dismiss. *Id.* On appeal, the Sixth Circuit affirmed the Court's denial of the plaintiff's motion to remand, as well as the Court's grant of the defendants' motion to dismiss for failure to state a claim. *Id.* at 878-85. In addition, the Sixth Circuit denied the defendants' motion for sanctions against the plaintiff on appeal, reasoning that the plaintiff's counsel[2] had "come up with a novel legal theory," albeit one the court rejected. *Id.* at 886-87.

The Sixth Circuit did not hold that Grabhorn's legal theory—that doctors not licensed in Kentucky violate the state's medical-licensure laws when they render an opinion in a disability case—was viable. The court found that such a claim was preempted under ERISA, *id.* at 878-83; as to the sanctions issue, the court was "reluctant to sanction an unsuccessful attempt to push the boundaries of [the ERISA preemption] doctrine," *id.* at 887. The Sixth Circuit's view on sanctions for "frivolous" appeals, *id.* at 886-87, is not applicable here, however, where Grabhorn was sanctioned for threatening to sue an opposing party's witness (D.N. 72).

Grabhorn asserts that he acted appropriately on the basis of a claim found to be legally viable in *Hogan*. (D.N. 145, PageID # 2659) But *Hogan* was decided in 2016—after Grabhorn sent the letter to Dr. Semble on January 22, 2015, threatening to sue him if he did not withdraw his medical opinion. (*See* D.N. 27-2) At the time Grabhorn sent the letter, judges within this district had twice rejected Grabhorn's argument that unlicensed medical professionals are engaged in the practice of medicine when they investigate a disability claim. *See Anderson v.*

[2] It is worth noting here that Grabhorn served as the plaintiff's counsel in *Hogan*.

Standard Ins. Co., No. 3:14-CV-00051-H, 2014 WL 5366117, at *3 (W.D. Ky. Oct. 21, 2014); *Hackney v. Lincoln Nat'l Life Ins. Co.*, No. 3:12-CV-00170-CRS, 2014 WL 2440691, at *13-14 (W.D. Ky. May 30, 2014). And in November 2016, the Sixth Circuit affirmed the *Hackney* district court's rejection of Grabhorn's argument that unlicensed nurses who reviewed the plaintiff's application for disability benefits were engaged in the practice of medicine in violation of Ky. Rev. Stat. § 311.560. *Hackney v. Lincoln Nat'l Fire Ins. Co.*, 657 F. App'x 563, 569, 579 (6th Cir. 2016). It is therefore disingenuous for Grabhorn to assert that such a legal theory is viable, as the Sixth Circuit has already rejected it in one of his own cases.

Irrespective of whether Grabhorn's threat to sue Dr. Semble was based upon a viable legal theory—which it is not—the Court notes that Grabhorn's actions still would have been sanctionable. Grabhorn "knowingly made comments and took actions designed to intimidate an opposing witness into backing down from his opinions," and as the Court previously concluded, his tactics must be sanctioned. (D.N. 72, PageID # 1563) The Court finds no merit in Grabhorn's argument that sanctions were unwarranted in light of the Sixth Circuit's decision in *Hogan*.

B. Standard's Interactions with Dr. Semble

Next, Grabhorn asserts that "Standard's interactions with Dr. Semble raise more questions than answers." (D.N. 145, PageID # 2662-64) The Court notes at the outset that Grabhorn attempts again to challenge the Court's earlier conclusion that sanctions were warranted based upon his conduct in "threatening litigation against an opposing party's witness" and "knowingly ma[king] comments and [taking] actions designed to intimidate" that witness. (*See* D.N. 72, PageID # 1563) But the only objections properly before the Court at this stage

relate to the amount of the sanctions award contained in Judge Whalin's order. (*See* D.N. 144) In any event, none of Grabhorn's arguments compel a change in the Court's earlier conclusion.

Grabhorn first challenges the purported failure of Standard's counsel to disclose that she also represented Dr. Semble. (D.N. 145, PageID # 2662) Had Standard's counsel notified him that Dr. Semble was represented, Grabhorn argues, his threat to sue the doctor could have been resolved by counsel or through motion practice. (*Id.*, PageID # 2662-63) The Court has already found that Grabhorn "knowingly made comments and took actions designed to intimidate an opposing witness into backing down from his opinions" and concluded that "[h]is tactics must be sanctioned." (D.N. 72, PageID # 1563) Grabhorn's after-the-fact excuse that he would not have attempted to intimidate the witness had he known that the witness was represented does nothing to alter the Court's earlier conclusion that sanctions were warranted under these circumstances.

Grabhorn points the finger at Standard's counsel again with his argument that he should not have been sanctioned because Standard allegedly instructed Dr. Semble not to comply with the subpoena. (D.N. 145, PageID # 2663-64) Grabhorn has presented no proof that Standard instructed the witness not to comply, however. He points to evidence showing only that Standard's counsel spoke with Dr. Semble on the phone regarding the subpoena. (*See id.*) Further, Grabhorn's assertion that Dr. Semble "refused to comply" with the subpoena (*see id.*) is misleading. The subpoena requested documents referring and relating to Graves. (D.N. 35-1, PageID # 837) But as reflected in the fax Dr. Semble's records custodian later sent to Grabhorn, the doctor's office had no such records because Graves had never been seen there. (D.N. 35-2, PageID # 842) While Grabhorn cites authorities noting that an adversary of a party seeking information may not advise a non-party to ignore a subpoena (D.N. 145, PageID # 2664), he offers nothing but speculation in support of his argument that Standard obstructed his client's

discovery efforts. Grabhorn's attempt to avoid sanctions with these allegations against Standard is therefore unavailing.

C. The Purpose of Sanctions

Grabhorn argues that the magistrate judge should have limited the sanctions against him to those necessary to deter future misconduct. (*See* D.N. 145, PageID # 2664-65) Judge Whalin imposed sanctions against Grabhorn based upon 28 U.S.C. § 1927, which provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. (*See* D.N. 144, PageID # 2651-56) The Sixth Circuit has recognized that the goal of § 1927 is "not to make a party whole, but to deter and punish." *Tilmon-Jones v. Boladian*, 581 F. App'x 493, 498 (6th Cir. 2014). Sanction awards may therefore be "substantially less than the full amount of fees and costs incurred." *Id.*

Judge Whalin took this deterrence goal into account and calculated the sanctions in this case using the lodestar method.[3] (D.N. 144, PageID # 2653-55) While Grabhorn acknowledges that "the lodestar method can be an appropriate method to calculate potential sanctions," he nonetheless criticizes the magistrate judge for relying on reasonableness as opposed to both reasonableness and the deterrence rationale. (D.N. 145, PageID # 2665) But in his order, Judge Whalin made clear that the sanctions were both reasonable and sufficient to deter future misconduct. (*See* D.N. 144, PageID # 2654-57) Moreover, Grabhorn points to no alternative to the lodestar method other than to suggest a "test" that would take into account reasonableness

[3] "The lodestar method involves multiplying 'the number of hours reasonably expended on the litigation . . . by a reasonable hourly rate.'" *Graves v. Standard Ins. Co.*, No. 3:14-cv-00558-CRS-DW, 2016 WL 6824403, at *2 (W.D. Ky. Nov. 17, 2016) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

and deterrence and that would be accompanied by a "thorough explanation and analysis of the facts." (D.N. 145, PageID # 2665) The Court finds no error in Judge Whalin's use of the lodestar method or his explanation and analysis of the facts. *See Graves*, 2016 WL 6824403, at *2-3 (using lodestar method to calculate § 1927 sanctions to be imposed upon attorney Grabhorn for provoking a witness during a deposition in this very case). Grabhorn's argument that the magistrate judge's order does not serve the deterrence purpose of § 1927 is unpersuasive.

D. Award Amount

Finally, Grabhorn maintains that the magistrate judge's award of attorney fees was excessive. (D.N. 145, PageID # 2666) Judge Whalin ordered Grabhorn to pay Standard $10,962 in attorney fees (D.N. 144, PageID # 2657), which amounts to half of what Standard requested in its bill of costs (*see* D.N. 75). In reaching that amount, Judge Whalin took notice of § 1927's mandate that only "*excess* costs, expenses, and attorneys' fees" are to be awarded due to an attorney's "unreasonabl[e] and vexatious[]" conduct. 28 U.S.C. § 1927 (emphasis added). (*See* D.N. 144, PageID # 2651-53) In accordance with the statute, Judge Whalin determined that Standard should not be able to recover *all* of its costs associated with the motion for sanctions and the events leading up to it. (*See id.*, PageID # 2650, 2656) Instead, he subtracted from the requested amount those costs that Standard still would have incurred absent Grabhorn's letter threatening to sue Dr. Semble. (*See id.*, PageID # 2655-56) Judge Whalin thought it reasonable to make Grabhorn pay for only half of the hours of legal services billed, as half of those bills likely would have been incurred "irrespective of the . . . letter for work done in relation to the subpoena to Dr. Semble (either by motion to quash or defending an action to compel compliance)." (*Id.*, PageID # 2656)

Grabhorn argues that the magistrate judge's award of $10,962 is excessive because (1) it is more than double the amount his client could have recovered in this lawsuit; (2) Standard should not have spent so much time on this "collateral" issue; and (3) Standard's counsel could not have spent 42.05 hours on the motion for sanctions and the events leading up to it. (D.N. 145, PageID # 2666) The Court finds Judge Whalin's analysis and award amount to be appropriate, however. In particular, the Court notes that the time billed includes time spent not only bringing the motion for sanctions but also responding to Grabhorn's prior objections to Judge Whalin's report and recommendation on the motion for sanctions, responding to Grabhorn's motion to strike its response to the objections, and preparing the bill of costs.[4] (D.N. 75-1, PageID # 1598-1602) The Court concludes that an award of $10,962 based upon 42.05 hours of legal work is reasonable under the circumstances.

The Court finds no clear error in Judge Whalin's factual findings, nor does it find that any of his legal conclusions were contrary to law. *See Blackwell*, 2017 WL 927239, at *2. The Court will therefore overrule Grabhorn's objections.

II. MOTION FOR SUMMARY JUDGMENT

Standard seeks summary judgment on all claims in Graves's amended complaint. (D.N. 147) These claims include breach of contract, breach of the duty of good faith and fair dealing, violation of the Kentucky Unfair Claims Settlement Practices Act (KUCSPA), and violation of the Kentucky Consumer Protection Act (KCPA). (D.N. 1-3)

A. BACKGROUND

Standard Insurance Company issued a group long-term disability insurance policy to the Commonwealth of Kentucky for the benefit of Jefferson County Public Schools as policyholder.

[4] This time was properly included in accordance with the Court's prior order awarding reasonable costs and fees "attributable to the [motion for sanctions]." (D.N. 72, PageID # 1563)

(D.N. 101-2, PageID # 2028-31) As a school bus driver for JCPS, Linda Graves was covered under the policy. (*See* D.N. 67, PageID # 1438; D.N. 69, PageID # 1529) The Group Policy provides two different time periods for disability insurance coverage: an "Own Occupation Period" and an "Any Occupation Period." (D.N. 101-2, PageID # 2034) The Own Occupation Period includes the first twenty-four months for which long-term disability benefits are paid, whereas the Any Occupation Period lasts from the end of the Own Occupation Period to the end of the "Maximum Benefit Period."[5] (*Id.*) During the Own Occupation Period, the insured is only required to be disabled from her own occupation, meaning that she is "unable to perform with reasonable continuity the Material Duties of [her] Own Occupation" "as a result of Physical Disease, Injury, Pregnancy[,] or Mental Disorder." (*Id.*, PageID # 2040-41) During the Any Occupation Period, however, the insured is required to be disabled from all occupations, meaning she is "unable to perform with reasonable continuity the Material Duties of Any Occupation" "as a result of Physical Disease, Injury, Pregnancy[,] or Mental Disorder." (*Id.*)

The Group Policy further provides that the amount of an insured's long-term disability benefit will be reduced by "Deductible Income." (*Id.*, PageID # 2035) Deductible Income includes any amount the insured "receive[s] or [is] eligible to receive because of [her] disability or retirement under . . . The Federal Social Security Act" and any disability or retirement benefits the insured "receive[s] or [is] eligible to receive under [her] Employer's retirement plan, including a public employee retirement system." (*Id.*, PageID # 2045-46) The Group Policy requires an insured to repay Standard for any overpayments that result from the receipt of deductible income. (*See id.*, PageID # 2047-48)

[5] The Maximum Benefit Period is defined as the lesser of five years or age seventy. (D.N. 101-2, PageID # 2035)

On May 23, 2011, Standard notified Graves that her long-term disability claim had been approved on the basis of her inability to perform her own occupation as a bus driver. (D.N. 101-4; *see* D.N. 101-5, PageID # 2259) Standard later sent Graves a letter, dated March 26, 2013, informing her that her "Definition of Disability [would] change after 24 months" pursuant to JCPS's Group Policy. (D.N. 101-5, PageID # 2257) The letter further advised Graves that Standard was "continuing to evaluate [her] claim to determine if [she met] the second Definition of Disability," namely the "Any Occupation" definition. (*Id.*, PageID # 2257-59) Standard ultimately concluded that Graves did not meet the "Any Occupation" definition of disability and notified Graves that her claim would close on October 17, 2013. (D.N. 101-7, PageID # 2278)

Prior to making its decision to deny Graves's claim, Standard retained physicians and vocational experts to review her file and offer their opinions regarding Graves's physical limitations and ability to work. (*See id.*, PageID # 2280-82) Dr. Lukas Zebala concluded that Graves could continue to be employed in a "sedentary or light work capacity." (D.N. 147-2, PageID # 2723-24) Dr. Richard Semble similarly concluded that Graves "[did] have [the] work capacity" for lifting up to ten pounds occasionally and standing, sitting, and walking for a total of eight hours. (D.N. 147-3, PageID # 2749-50) Certified Rehabilitation Counselors Brian Petersen and Elizabeth Davis identified sedentary occupations that Graves could perform given her physical limitations. (*See* D.N. 147-5, PageID # 2770-75; D.N. 147-4, PageID # 2754-62)

Graves filed this suit against Standard in state court in 2014, asserting claims of breach of contract, breach of the duty of good faith and fair dealing, violation of the KUCSPA, and violation of the KCPA. (D.N. 1-3) Standard thereafter removed the action to federal court, invoking this Court's diversity jurisdiction. (D.N. 1) Standard later brought counterclaims against Graves for breach of contract, unjust enrichment, restitution and recoupment, and

declaratory judgment, seeking to recover overpayments Graves received and failed to repay. (D.N. 67, PageID # 1435-44) The Court previously dismissed the counterclaims for unjust enrichment, restitution and recoupment, and declaratory judgment. (D.N. 120; D.N. 132) However, the Court granted summary judgment to Standard on its counterclaim for breach of contract, finding that Graves was obligated to repay Standard for the overpayment amount. (D.N. 132; D.N. 131, PageID # 2614-17) Standard now seeks summary judgment on all of Graves's claims. (D.N. 147)

B. STANDARD

Summary judgment is required when the moving party shows, using evidence in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see* 56(c)(1). "A 'genuine issue of material fact exists when there is sufficient evidence for a trier of fact to find for the non-moving party.'" *Bush v. Compass Grp. USA, Inc.*, 683 F. App'x 440, 444 (6th Cir. 2017) (quoting *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 565 (6th Cir. 2016)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* (emphasis in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).

For purposes of summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 588 (6th Cir. 2014) (citing *Anderson*, 477 U.S. at 255). However, the Court "need consider only the cited materials." Fed. R. Civ. P. 56(c)(3); *see Shreve v. Franklin Cty., Ohio*, 743 F.3d 126, 136 (6th Cir. 2014). If the nonmoving party "fails to properly support an assertion of fact or fails to

properly address another party's assertion of fact as required by Rule 56(c)," the fact may be treated as undisputed. Fed. R. Civ. P. 56(e). To survive a motion for summary judgment, the nonmoving party must establish a genuine issue of material fact with respect to each element of each of his claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (noting that "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

C. DISCUSSION

1. Breach of Contract

Graves first asserts that Standard breached the long-term disability insurance policy by terminating her monthly disability-income benefit, not accurately calculating the monthly disability-income benefit, and not complying with the terms of the policy in the administration of her claim. (D.N. 1-3, PageID # 20) Standard argues that Graves's claim fails on three independent grounds: Graves owes Standard an outstanding overpayment that exceeds the amount of her claim; Graves lacks evidence to prove disability; and Standard's unrebutted evidence establishes that Graves's medical condition did not preclude her from working in any occupation. (*See* D.N. 147-1, PageID # 2697-98, 2700, 2711)

A breach-of-contract claim consists of three elements: (1) the existence of a contract; (2) breach of that contract; and (3) damages suffered as a result of the breach. *Woodside Olympic Custom Homes, LLC v. New Horizon Mech., Inc.*, No. 1:14-cv-60-DJH-HBB, 2016 WL 715789, at *2 (W.D. Ky. Feb. 22, 2016) (citing *Barnett v. Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723, 727 (Ky. Ct. App. 2007)). "The interpretation of an insurance contract is a question of law for the Court to decide." *Caudill Seed & Warehouse Co. v. Houston Cas. Co.*, 835 F. Supp. 2d 329, 332 (W.D. Ky. 2011). Under Kentucky law, "[t]he clear and unambiguous words

of an insurance contract should be given their plain and ordinary meaning." *Primary Care Med. Ctr., PSC v. Peerless Indem. Ins. Co.*, 780 F. Supp. 2d 555, 558 (W.D. Ky. 2011) (quoting *York v. Ky. Farm Bureau Mut. Ins. Co.*, 156 S.W.3d 291, 293 (Ky. 2005)). "In the absence of ambiguities, . . . the terms of an insurance policy will be enforced as written." *Id.* (quoting *State Auto. Mut. Ins. Co. v. Sec. Taxicab, Inc.*, 144 F. App'x 513, 517 (6th Cir. 2005)). But "when a contract is susceptible of two meanings, it will be construed strongest against the party who drafted and prepared it." *Id.* (quoting *Perry v. Perry*, 143 S.W.3d 632, 633 (Ky. Ct. App. 2004)).

The Group Policy provides that the amount of an insured's long-term disability benefit will be reduced by "deductible income." (D.N. 101-2, PageID # 2035) Deductible income includes any amount the insured is eligible to receive under the Social Security Act and any benefits received by the insured under her employer's retirement plan. (*Id.*, PageID # 2045-46) The policy additionally requires the insured to repay Standard in the event that she receives deductible income after payment is made:

> We will notify you of the amount of any overpayment of your claim under any group disability insurance policy issued by us. You must immediately repay us. You will not receive any LTD Benefits until we have been repaid in full. In the meantime, any LTD Benefits paid, including the Minimum LTD Benefit, will be applied to reduce the amount of the overpayment. We may charge you interest at the legal rate for any overpayment which is not repaid within 30 days after we first mail you notice of the amount of the overpayment.

(*Id.*, PageID # 2047-48)

Standard brought a counterclaim against Graves for breach of contract based on this overpayment provision after she failed to repay the company for overpaid benefits that resulted from her receipt of benefits from the Kentucky Retirement System and the Social Security Administration. (D.N. 67, PageID # 1435, 1440-41) The Court previously granted summary judgment to Standard on its breach-of-contract counterclaim, finding that Graves was obligated

to repay Standard for the overpaid long-term disability benefits. (D.N. 131, PageID # 2615; D.N. 132, PageID # 2626) However, in the same opinion, the Court denied Standard's motion for summary judgment on Graves's breach-of-contract claim, rejecting Standard's argument that Graves could not establish breach because no benefits could be paid when repayment was owed.[6] (D.N. 131, PageID # 2623-24; D.N. 132, PageID # 2626) The Court reasoned that the overpayment provision "[did] not bar an employee receiving benefits under the Group Policy from asserting a breach of contract claim against Standard if . . . she owes overpaid benefits." (D.N. 131, PageID # 2623) Rather, the provision "only require[d] the employee to immediately repay the overpaid benefits before receiving any additional benefits under the Group Policy." (*Id.*) Standard acknowledges the Court's prior decision in its brief but argues that Graves "cannot receive any additional benefits under the Group Policy under any circumstances." (D.N. 147-1, PageID # 2697-98)

The Court need not decide what effect the overpayment provision has upon Graves's breach-of-contract claim, however, because Graves has failed to establish that she was entitled to long-term disability benefits under the Group Policy. Standard initially approved Graves's claim for long-term disability benefits for a period of twenty-four months, as it determined that Graves was unable to continue working as a school bus driver due to her disabling conditions. (*See* D.N. 101-3, PageID # 2060-61; D.N. 101-4; *see also* D.N. 101-2, PageID # 2034, 2040-41) After that twenty-four-month period, however, the policy's definition of disability changed such that Graves was only considered disabled if she was disabled from all occupations. (*See* D.N. 101-2,

[6] In denying summary judgment, the Court noted that Standard "[did] not assert that Graves [could not] meet her burden of proof for this claim based on the available evidence." (D.N. 131, PageID # 2623) In its current summary-judgment motion, Standard expressly argues that Graves "cannot satisfy her burden to establish that she qualifies for payment of LTD Benefits under the Group Policy." (D.N. 147-1, PageID # 2705)

PageID # 2034, 2040-41; D.N. 101-5) In order to be deemed disabled from all occupations, a person must be "unable to perform with reasonable continuity the Material Duties of Any Occupation" "as a result of Physical Disease, Injury, Pregnancy[,] or Mental Disorder." (D.N. 101-2, PageID # 2041) On October 17, 2013, Standard notified Graves that it had concluded that she did not meet this "Any Occupation" definition of disability and that she was not entitled to further benefits under the policy. (*See* D.N. 101-7)

The Court finds the policy's definition of disability from all occupations to be clear and unambiguous; as such, it will be given its plain and ordinary meaning. *See Primary Care Med. Ctr., PSC*, 780 F. Supp. 2d at 558. Standard has presented evidence showing that Graves was able to "perform with reasonable continuity the Material Duties of" some occupations. (D.N. 101-2, PageID # 2041) Dr. Zebala reviewed Graves's medical records and concluded that Graves could continue to be employed in a sedentary or light work capacity. (D.N. 147-2, PageID # 2723-24) Dr. Semble also reviewed the medical records and concluded that Graves had work capacity in that she could lift up to ten pounds occasionally and stand, sit, and walk for eight hours with four to six hours of sitting and two hours each of standing and walking.[7] (D.N. 147-3, PageID # 2749-50) In addition, vocational experts conducted transferable-skills

[7] In her response, Graves continues to argue that Dr. Semble violated Kentucky law by rendering an opinion on her medical conditions without being licensed to practice in this state. (D.N. 153, PageID # 2823-25) She therefore asks the Court to strike Dr. Semble's testimony from the record. (*Id.*, PageID # 2825) But as the Court has already noted, the Sixth Circuit recently held that medical professionals are not engaged in the practice of medicine when they review a medical file to determine whether a disability claimant is capable of performing work. *See Hackney*, 657 F. App'x at 579; *Hackney*, 2014 WL 2440691, at *13-14. The Court therefore declines to strike Dr. Semble's testimony. Graves also argues that Dr. Semble violated Ky. Rev. Stat. § 311.420, a statute regarding the practice of podiatry that has no relevance to this case, and § 311.597, a medical ethics statute. (D.N. 153, PageID # 2823-24) But Graves did not even specify which section of § 311.597 Dr. Semble might have violated, much less present evidence to support her argument. (*See id.*) The Court thus finds Graves's various attacks upon Dr. Semble to be meritless. His testimony is properly before the Court.

assessments of Graves and identified a number of sedentary occupations that Graves could perform. (D.N. 147-4; D.N. 147-5) For example, CRC Petersen concluded that Graves had the functional capacity to work as a motor-vehicle dispatcher, telemarketer, and telephone operator. (D.N. 147-5, PageID # 2770, 2772-75) CRC Davis likewise concluded that "none of [Graves's] restrictions or limitations would preclude her from participating in full time sedentary employment," including work as a telemarketer, switchboard operator, receptionist, dispatcher, order clerk, or data-entry clerk. (D.N. 147-4, PageID # 2760-62)

In her response, Graves does not argue that she is unable to perform the duties of any occupation. (*See* D.N. 153) Rather, she argues that she has various medical conditions. (*See id.*) The mere existence of medical conditions is not sufficient to show disability as it is defined in the Group Policy, however. Instead, Graves must show that her physical diseases or injuries render her unable to perform the material duties of *any* occupation. (*See* D.N. 101-2, PageID # 2041) Graves has made no such showing. Moreover, while Graves details her medical conditions (albeit without citations to the record) in her response to Standard's motion (*see* D.N. 153, PageID # 2822-23), she earlier refused to respond to Standard's interrogatory asking her to describe the nature of her disabling conditions.[8] (D.N. 101-11, PageID # 2295) As a result, she is precluded from relying on evidence of her medical conditions, to the extent that it exists, in opposing summary judgment. *See First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 198 F.3d 245 (6th Cir. 1999) (unpublished table disposition) (holding that affidavit submitted in opposition to summary judgment should not have been considered by the district court where it was inconsistent with earlier interrogatory response). Graves has therefore failed to show that she was disabled under the Group Policy.

[8] Graves objected that the interrogatory "improperly ask[ed] [her] to provide medical opinions that are best answered by licensed medical physicians." (D.N. 101-11, PageID # 2295)

Graves appears to argue in her response that Dr. Semble ignored the findings of Dr. Gregory Nazar and Dr. Blaine Lisner, both of whom treated her. (*See* D.N. 153, PageID # 2822-23) But Graves does not cite any material in the record to support her argument, and as Standard points out in its reply (D.N. 154, PageID # 2830), the Court is not required to scour the record in search of evidence to support a pro se plaintiff's claims. *See Bormuth v. Cty. of Jackson*, 870 F.3d 494, 499-500 (6th Cir. 2017) ("Under Federal Rule of Civil Procedure 56(c), the opposing party 'has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.'" (quoting *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 995 (6th Cir. 2007))); *see also id.* at 500 (noting that a "mere reference to the . . . general availability" of evidence "falls well short of" even a pro se litigant's duty to direct the Court's attention to specific portions of the record).

Finally, Graves asserts in her response that both the Social Security Administration and the Kentucky Retirement System found her to be "100 percent disable[d]." (D.N. 153, PageID # 2823) Notwithstanding the fact that Graves again fails to point the Court to any materials in the record as required by Rule 56(c), the Court gives little weight to administrative findings of disability where they rely on standards of disability that differ from the one in the insurance policy at issue. *See Pogue v. Nw. Mut. Life Ins. Co.*, No. 3:14-CV-00598-CRS, 2018 WL 1189415, at *5 (W.D. Ky. Mar. 7, 2018) ("[T]he inquiry into an individual's disability for purposes of determining social security benefits is different than it is for purposes of determining benefits under a long-term disability insurance policy."). SSA regulations place the burden on the agency to provide evidence regarding work that a claimant can do given her residual functional capacity. *See* 20 C.F.R. § 416.912(b)(3). In contrast, Kentucky law requires a party seeking to establish insurance coverage to show that coverage is appropriate under the policy.

See Ross v. Am. Gen. Life Ins. Co., No. 5:14-CV-00076-TBR, 2015 WL 3407420, at *3 (W.D. Ky. May 26, 2015) ("Under Kentucky law, the party seeking to establish coverage bears the burden of establishing that the incident at issue was within the scope of the policy." (quoting *Secura Ins. Co. v. Gray Constr., Inc.*, 717 F. Supp. 2d 710, 714-15 (W.D. Ky. 2010))). And while the KRS's disability standard asks whether an individual can perform a job similar to that from which she last received a paycheck, *see* Ky. Rev. Stat. § 61.600(3)(a), the Group Policy asks whether an individual can perform the material duties of *any* job. (*See* D.N. 101-2, PageID # 2041) Because the standards of disability relied upon by the SSA and the KRS are substantially different from the Group Policy standard at issue here, the Court gives those agencies' decisions little weight. *See Pogue*, 2018 WL 1189415, at *5-6 (giving disability conclusion of SSA judge little weight and granting summary judgment to defendant life insurance company on plaintiff's breach-of-contact claim).

In short, Graves has not shown that she was disabled and therefore entitled to benefits (*see* D.N. 101-2, PageID # 2037),[9] and as a result, she has no viable claim that Standard breached the terms of the insurance policy by terminating her benefits. *See Pogue*, 2018 WL 1189415, at *5 (holding that breach-of-contract claim failed as a matter of law where insurance contract precluded payment); *Whisenant v. State Farm Mut. Auto. Ins. Co.*, No. 3:12-CV-00290-H, 2013 WL 842586, at *3 (W.D. Ky. Mar. 6, 2013) (holding that plaintiff's breach-of-contract claim against State Farm failed as a matter of law where plaintiff was not entitled to insurance benefits

[9] Standard only pays long-term disability benefits to insured individuals who become disabled while they are covered by the Group Policy. (*See* D.N. 101-2, PageID # 2037)

when she made her demand). The Court will grant summary judgment in favor of Standard on Graves's breach-of-contract claim.[10]

2. Breach of the Duty of Good Faith and Fair Dealing, Violations of the KUCSPA and the KCPA

Graves also asserts that Standard breached its duty of good faith and fair dealing and violated the Kentucky Unfair Claims Settlement Practices Act and the Kentucky Consumer Protection Act in terminating her monthly disability-income benefit. (D.N. 1-3, PageID # 20-26) Under Kentucky law, all three of these claims fall under the umbrella of "bad faith" and consist of the same elements:

> (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed[.]

State Auto Prop. & Cas. Ins. Co. v. Hargis, 785 F.3d 189, 197 (6th Cir. 2015) (quoting *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993)). It follows from the first element that "Kentucky law does not provide a bad-faith cause of action unless the plaintiff can also prove that the insurance company had a contractual obligation to pay the claim." *Holloway v. Ohio Sec. Ins. Co.*, No. 3:14-CV-00856-CRS, 2015 WL 6870141, at *1 (W.D. Ky. Nov. 6, 2015) (citing *Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000)). The Court concluded above that

[10] Throughout her response, Graves asserts that she has been unfairly prejudiced by her former counsel's failure to depose her treating physicians and failure to hire an expert witness to testify as to her medical conditions. (*See* D.N. 153, PageID # 2821-22, 2824-25) While the Court recognizes Graves's unfortunate position, alleged litigation errors do not provide cause for denying summary judgment where it has been shown that there is no genuine dispute of material fact. *See Lowe v. CSL Plasma Inc.*, No. 3:12-CV-00591-CRS, 2016 WL 1090631, at *1 (W.D. Ky. Mar. 18, 2016) ("The Court gives leniency to pro se plaintiffs, but 'pro se plaintiffs are not automatically entitled to take every case to trial.'" (quoting *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996))); *see also Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988) (holding that nonprisoner pro se litigants are not entitled to any "special assistance" at the summary-judgment stage).

Standard was not contractually obligated to pay Graves's claim, as she failed to show that she was entitled to benefits under the Group Policy. As such, Graves does not have a viable bad-faith claim against Standard. *See id.* The Court will therefore grant summary judgment in favor of Standard on Graves's claims for breach of the duty of good faith and fair dealing and violations of the KUCSPA and KCPA. *See Pogue*, 2018 WL 1189415, at *6 ("Because [plaintiff] is not entitled to disability benefits under [her] insurance polic[y], [her] claims against [defendant] for common law bad faith, violation of the Kentucky Unfair Claims Settlement Practices Act, and violation of the Kentucky Consumer Protection Act likewise fail as a matter of law.").

III. CONCLUSION

For the reasons discussed above, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) Graves's former counsel's objections (D.N. 145) are **OVERRULED**. Attorney Michael Grabhorn shall comply with Judge Whalin's order. (D.N. 144)

(2) Standard Insurance Company's motion for summary judgment (D.N. 147) is **GRANTED**.

(3) A separate judgment will be entered this date.

March 30, 2018

David J. Hale, Judge
United States District Court