

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of )

F V )

OAH No. 13-1306-MDS  
Agency No.

**DECISION**

The parties have requested summary adjudication on whether the Activity of Daily Living (ADL) of toileting includes transfers to and from a chair or bed before and after the recipient uses the bathroom. Following the precedent set by the Commissioner of Health and Social Services' decision in *In re N.D.*, the answer is that it does not.<sup>1</sup>

In *In re N.D.*, the primary issue was “whether the ADL of toileting includes the act of transferring out of bed, and the act of walking down the hall, when those acts are done for the purpose of using the toilet.”<sup>2</sup> After careful consideration and analysis of the PCA regulations, the CAT and prior decisions,<sup>3</sup> it was concluded these transfers and associated locomotion should be included in their respective frequencies separate from toileting:

The division under-assessed the frequency with which Ms. D transferred each week because it did not include Ms. D's transfer from her bed to her day bed, regardless of whether she stops to toilet on the way. The division should have counted that transfer and the transfer to the day bed. Similarly, every time she gets up to locomote to the bathroom and back to bed, each transfer is counted. Ms. D toiles four times a day in addition to her morning toilet. She does not receive a transfer for her morning toilet because that transfer occurs when she gets out of bed to move to the day bed. Therefore, Ms. D should be assessed a frequency score of 12 transfers per day, seven days a week for a weekly total transfer score of 84.<sup>[4]</sup>

The 12 transfers were calculated as follows:

Two in the morning (from bed to locomote and locomote to day bed), eight associated with toileting (four from bed to locomote and four from locomote to bed) and two in the evening (day bed to locomote and locomote to bed).<sup>[5]</sup>

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<sup>1</sup> *In re N.D.*, OAH No. 13-0585-MDS (August 16, 2013) (Commissioner of Health and Human Services).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.* at 4, 5 (affirming and reconciling *In re V.W.*, OAH No. 12-0957-MDS (February 25, 2013) (Commissioner of Health and Social Services)).

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at note 27.

The August 16, 2013 ruling should have been applied by the division to Ms. V's assessment before it made its final decision on September 9, 2013 regarding frequency for transfers (outside of the bathroom). For the reasons set forth in *In re N.D.* the claimant's motion for summary adjudication is GRANTED. The division will recalculate transfers and locomotion following the precedent set by the Commissioner of Revenue's decision in *In re N.D.*, OAH No. 13-0585-MDS (August 16, 2013) (Commissioner of Health and Social Services).

DATED this 15<sup>th</sup> day of November, 2013.

By: Signed  
Rebecca L. Pauli  
Administrative Law Judge

**BEFORE THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of )  
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OAH No. 13-1306-MDS  
Agency No.

**FINAL DECISION**

**A. Background**

The case relates to the amount of Personal Care Assistant (PCA) time for which F V, a Medicaid recipient, is eligible. On September 9, 2013, the Division of Senior and Disability Services issued a decision reducing her PCA time, and Ms. V requested a Fair Hearing. During the Fair Hearing process, the parties settled all but one issue. To complete the resolution of the case, they requested summary adjudication on the legal issue of what surrounding activities are included in the Activity of Daily Living (ADL) of toileting.

The administrative law judge issued a brief proposed decision remanding the case to the division for recalculation of PCA time in accordance with *In re N.D.*,<sup>6</sup> a decision addressing the same issue that became final just prior to the division’s decision in Ms. V’s case. The administrative law judge indicated that, under *In re N.D.*, the PCA time awarded for “toileting” would not encompass any PCA time needed to assist locomotion to or from the room where the toilet is located.

I agree with the administrative law judge that this case is appropriately resolved by summary adjudication and that it must be remanded to the division for a recalculation of PCA time. However, as permitted by AS 44.64.060(e)(5), I hereby modify the regulatory interpretation contained in the proposed decision and restate the interpretation as modified.

In reaching this result, I am responding to the general request in the division’s Proposal for Action that I review the prior commissioner-level decisions in this area and clarify the interpretation of the applicable regulations. However, I have not considered the assertions in that Proposal for Action regarding the costs that might be associated with various interpretations, for two reasons. First, the division has never put any evidence in the record regarding these purported costs. Second, I view my role as that of applying the regulations the division has

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<sup>6</sup> OAH No. 13-0585-MDS (Commissioner of Health and Human Services, August 16, 2013).

written. Costs are best considered in the regulatory process; if the division’s regulations as written result in an unsustainable cost, the division may amend the regulations.

## **B. Regulatory Analysis**

The interpretation of the ADL of toileting has been directly at issue in at least the two following cases: *In re VW* (OAH No 12-0957-MDS) and *In re ND* (OAH No 13-0565-MDS).

The rule in *In re VW* is as follows:

When activities that fall within the regulatory definition of ‘transfers’ are performed incident to toileting, those activities are best assessed, under the CAT, within the ADL of toilet use. To do otherwise can result in the award of duplicate PCA time, under separate ADLs, for the performance of the same activity.<sup>7</sup>

The rule in *In re ND* is as follows:

The plain language of the ADL of toileting is limited to moving to/from or transferring to/from and on/off the toilet. It does not include the ADL of locomotion. The ADL of toileting starts at the end of the locomotion to the room in which the toilet or commode is located (if the person is not already in that room), when the actions of moving to and transferring onto the toilet begin.<sup>8</sup>

The relevant regulatory definition for the ADL of toileting covers “transfers on and off a toilet or commode” and “moving to and from the toilet, commode, bedpan, or urinal[.]”<sup>9</sup> “[T]ransfers on and off a toilet” clearly relates to the ADL of transferring.<sup>10</sup> “[M]oving to and from the toilet” clearly relates to the ADL of locomotion.<sup>11</sup> The critical question is to what degree these phrases relate to the referenced ADLs.

*In re VW* properly conveys the relationship between the ADL of toileting and the ADL of transferring. The ADL of transferring covers “moving between one surface and another[.]”<sup>12</sup> The ADL of toileting (7 AAC 125.030(b)(6)(B)) covers certain transfers. The transfers (movement between one surface and another) covered are those in which one of the surfaces is a toilet or commode.

For example, even though the movements at issue of the recipient in *In re VW* were transfers (i.e., moving between one surface and another), when the movements were from his wheelchair (one surface) to the toilet (another surface), and vice versa, those types of transfers

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<sup>7</sup> *In re VW* at 2.

<sup>8</sup> *In re ND* at 5.

<sup>9</sup> 7 AAC 125.030(b)(6)(A)-(B).

<sup>10</sup> See 7 AAC 125.030(b)(2).

<sup>11</sup> See 7 AAC 125.030(b)(3).

<sup>12</sup> 7 AAC 125.030(b)(2)(A).

fell within the ADL of toileting. Simply put, transfers in which one of the surfaces is a toilet or commode are incidental to the ADL of toileting and are exclusively covered within the ADL of toileting.

*In re ND* touches on the relationship between the ADL of toileting and the ADL of locomotion, but requires clarification in the decision before me. The ADL of locomotion covers “walking . . . between locations in the recipient’s home[.]”<sup>13</sup> As stated previously, the ADL of toileting covers “moving to and from the toilet, commode, bedpan, or urinal[.]”<sup>14</sup> Clearly, there is an overlap here, and it is necessary to go beyond the decision in *In re ND* to provide clarification on that overlap.

*In re ND* concluded that “The ADL of toileting starts at the end of the locomotion to the room in which the toilet or commode is located.” *In re ND* at 5. This conclusion effectively interprets “locations” in the regulatory definition of locomotion to mean room. A location does not have to be a room. Rather, it can also be a destination, including a destination that is a toilet. Accordingly, it is my interpretation that when a recipient locomotes between locations in his or her home, and one of those locations is the toilet, commode, bedpan, or urinal, then that locomotion is exclusively covered within the ADL of toileting as “move[ment] to and from the toilet, commode, bedpan, or urinal.”<sup>15</sup>

### **C. Conclusion**

The issue in this case is whether the Activity of Daily Living (ADL) of toileting includes transfers to and from a chair or bed before and after the recipient uses the bathroom, as well as locomotion to or from the toilet location. This issue can be decided with the following clarification. Transfers in which one of the surfaces is a toilet or commode are incidental to the ADL of toileting and are exclusively covered within the ADL of toileting. Additionally, when a recipient locomotes between locations in his or her home, and one of those locations is the toilet, commode, bedpan, or urinal, then that locomotion is exclusively covered within the ADL of toileting as “move[ment] to and from the toilet, commode, bedpan, or urinal.”<sup>16</sup>

Accordingly, in the case before me, the ADL of toileting does not include transfers to and from a chair or bed because those transfers do not include a surface that is a toilet or commode.

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<sup>13</sup> 7 AAC 125.030(b)(3)(A)(i).

<sup>14</sup> 7 AAC 125.030(b)(6)(A).

<sup>15</sup> 7 AAC 125.030(b)(6)(A).

<sup>16</sup> 7 AAC 125.030(b)(6)(A).

However, the ADL of toileting does include any instances of locomotion that are to and from the bathroom because this would be movement between locations in which one of the locations is a toilet. The case is remanded to the division to calculate PCA time in accordance with this decision.

DATED this 10<sup>th</sup> day of December, 2013.

By: Signed \_\_\_\_\_  
Jared C. Kosin  
Executive Director, Office of Rate Review  
(By delegation of DHSS Commissioner)

[This document has been modified to conform to the technical standards for publication.]