

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

In the Matter of:)	
)	
N Q)	OAH No. 13-1785-MDS
)	HCS Case No.
_____)	Medicaid ID No.

COMMISSIONER'S DECISION

After due deliberation, for the reasons specified below, and in accordance with AS 44.64.060(e)(3) and AS 44.64.060(e)(5), by delegation from the Commissioner of the State of Alaska Department of Health and Social Services, I decline to adopt the proposed decision of the Administrative Law Judge (ALJ) as issued, and instead modify and revise the disposition of the case as set forth below.

I. Revised Legal Analysis.

The undersigned, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the ALJ's interpretation of a statute or regulation in the decision as follows and for these reasons:

A. Introduction

This Medicaid Personal Care Assistant (PCA) case came before the administrative law judge (ALJ) in the context of a motion for summary adjudication based on stipulated facts. The only issue raised was the number of transfers to which N Q is entitled based on the Division of Senior and Disabilities Services' PCA regulation governing transfers, 7 AAC 125.030(b)(2) as applied to the stipulated facts. The case hinges upon the proper interpretation of that regulation.

The regulation defining transfers contains two subsections. 7 AAC 125.030(b)(2)(A) provides PCA time for transfers when a person requires physical assistance with "moving between one surface and another, including to and from a bed, chair, or wheelchair." 7 AAC 125.030(b)(2)(B) provides PCA time for transfers when a person requires physical assistance with "moving from a lying or sitting position to a standing position."¹ The definition of transfers contained in the Division's Consumer Assessment Tool (CAT), which is adopted into DHSS regulations by reference,² defines a transfer as "[h]ow [a] person moves between surfaces - to/from

¹ Note that subsection (b)(2)(B) does not, at least explicitly, provide PCA time for moving from a standing position back to a lying or sitting position.

² 7 AAC 160.900(d)(6).

bed, chair, wheelchair, standing position (exclude to/from bath/toilet)."³ The dispute in this case arises because a recipient must many times "move from a lying or sitting position to a standing position" under subsection (b)(2)(B), *and then* move from a standing position to a lying or sitting position (*i.e.* also perform the same maneuver in reverse), in order to "mov[e] between one surface [such as a bed, chair, or wheelchair] and another." Uncertainty as to how subsection (b)(2)(A) correlates with subsection (b)(2)(B) has caused the same number of movements to be interpreted as constituting one transfer under subsection (b)(2)(A), but as constituting two transfers under subsection (b)(2)(B).

In the proceedings before the ALJ, Ms. Q asserted that a transfer occurs every time the recipient moves from a lying or sitting position to a standing position, and vice-versa.⁴ The Division countered that, except for certain limited situations, standing up is only half the transfer, and that the transfer is not completed until the recipient later sits or lies back down on another (or the same) surface.⁵ The ALJ concluded that the only way to interpret 7 AAC 125.030(b)(2) without making one of the two subsections superfluous was to construe subsection (A) as defining a completed transfer, and subsection B as defining a partial transfer, which the ALJ referred to as a "half-transfer." Both parties filed Proposals for Action (PFAs) in response to the ALJ's proposed decision. The undersigned subsequently requested that the parties provide additional briefing, which they did. The undersigned has reviewed and considered all of these memoranda in reaching the instant decision.

B. Summary of the Parties' Arguments

Ms. Q's arguments can be summarized as follows:

1. There is no primary type of transfer.⁶ Subsections (A) and (B) of 7 AAC 125.030(b)(2) are not competing definitions, but rather apply to different situations.⁷ Subsection (A) applies to "horizontal transfers," typically from a chair into a wheelchair, or vice-versa,⁸ while subsection (B) applies to "vertical transfers" from a sitting position to a standing position, or vice-versa.⁹

³ See CAT form at page 6.

⁴ See Ms. Q's *Motion for Summary Adjudication* dated April 14, 2014 at pages 1, 3, and 4.

⁵ See the Division's post-hearing brief dated April 21, 2014 at page 5 ("[f]or example, if an individual is standing up to leave the house for a medical appointment, or to engage in walking exercises, it would be a transfer even though the individual is not moving to another surface").

⁶ See Ms. Q's post-hearing briefing dated August 25, 2014 at page 4.

⁷ See Ms. Q's Proposal for Action at page 3. Of course, the regulation itself fails to specify what situations subsection (A) applies to, and what different situations subsection (B) applies to.

⁸ See Ms. Q's Proposal for Action at page 3.

⁹ *Id.*

2. The term "surface" is not defined for purposes of the transfers regulation.¹⁰

3. The CAT's definition or example of a transfer carries the same weight as the definition in the regulation itself, and because the CAT's definition contains "to/from" language, a transfer must include assistance with moving from a standing position to a lying or sitting position, as well as "moving from a lying or sitting position to a standing position" as described in 7 AAC 125.030(b)(2)(B).¹¹

4. Any interpretation of the transfers regulation, which fails to include assistance with moving from a standing position to a lying or sitting position, discriminates between recipients in violation of the Americans with Disabilities Act (ADA).¹²

5. Interpreting the regulation and the CAT as including assistance with moving from a standing position to a lying or sitting position further the purpose of the PCA program, which is to provide physical assistance to persons with functional impairments.¹³

The Division's arguments can be summarized as follows:

1. Subsection (A) of the regulation applies to transfers between surfaces of the types referenced in Subsection (A) (beds, chairs, etc.), and this is the "primary" or most common type of transfer.¹⁴ Subsection (B) applies when moving to a standing position, without the intent of immediately moving to a surface of the type described in Subsection (A) (when a person gets up to leave the home, for example), and occurs less frequently.¹⁵

2. The floor is not a "surface" for purposes of 7 AAC 125.030(b)(2) or for purposes of the CAT's definition of a transfer.¹⁶

3. The primary purpose of the CAT is to determine the degree of assistance that a recipient requires with an activity, rather than to define the activity.¹⁷ Accordingly, where the regulation's definition of an activity differs from the CAT's definition of the activity, the regulation's definition takes precedence.

4. Applying Ms. Q's interpretation of the regulation would result in a drastic increase in the number of compensable transfers for which recipients would be eligible.¹⁸ This was not intended by the Division, and would provide more PCA time for transfers than most recipients need.¹⁹

¹⁰ See Ms. Q's post-hearing briefing dated August 25, 2014 at page 4.

¹¹ See Ms. Q's opening brief dated August 20, 2014 at pages 3 - 4.

¹² See Ms. Q's post-hearing briefing dated August 25, 2014 at page 3.

¹³ See Ms. Q's post-hearing briefing dated August 25, 2014 at pages 5 - 6.

¹⁴ *Id.* at pages 4 - 6.

¹⁵ *Id.* at pages 4 - 6.

¹⁶ See the Division's opening brief dated August 20, 2014 at pages 3-4.

¹⁷ *Id.* at pages 9 - 10.

¹⁸ *Id.* at pages 7 - 9.

¹⁹ *Id.* at pages 10 - 11.

The parties' arguments are addressed below.

C. *The two Subsections of the "Transfers" Regulation can be Harmonized*

Under the Division's regulations, PCA time is allowed for transfers when a person requires physical assistance with "(A) moving between one surface and another, including to and from a bed, chair, or wheelchair; (B) moving from a lying or sitting position to a standing position."²⁰ The description of transfers in the CAT is similar, except that the CAT includes "to/from" language which is absent from the regulation, and clarifies that transfers to and from a toilet or bath are excluded.²¹

The ALJ was concerned that, because 7 AAC 125.030(b)(2)(A) indicates that a *complete* transfer requires the recipient to *both* arise from one surface, *and* alight on another, different surface, while 7 AAC 125.030(b)(2)(B) indicates that merely "moving from a lying or sitting position to a standing position" constitutes a transfer, defining a recipient's transfers solely according to subsection (B) could result in twice the number of transfers as would defining transfers solely according to subsection (A). Significantly, the ALJ interpreted subsection (B) as including both moving from a lying or sitting position to a standing position, *and the reverse* (moving from a standing position to a lying or sitting position).

Ms. Q proposes that this problem can be avoided by construing subsections (A) and (B) of the transfers regulation (7 AAC 125.030(b)(2)) *as applying to different types of transfers*.²² Under Ms. Q's proposal, subsection (A) ("moving between one surface and another, including to and from a bed, chair, or wheelchair") should be construed as applying only to "horizontal transfers," where the recipient (in a recumbent or sitting position) is transferred to another surface (other than the floor), where the recipient is again in a recumbent or sitting position. This type of transfer would apply primarily to recipients who are in wheelchairs or are otherwise incapable of standing. Ms. Q asserts that subsection (B) ("moving from a lying or sitting position to a standing position") is

²⁰ See 7 AAC 125.030(b)(2).

²¹ See Ex. E6. In *In re F.V.*, OAH No. 13-1306-MDS (Commissioner of Health and Social Services 2013), it was stated that "[t]he ADL of toileting (7 AAC 125.030(b)(6)(B)) covers certain transfers;" that "[t]he transfers (movement between one surface and another) covered are those in which one of the surfaces is a toilet or commode;" and that "[t]ransfers 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."

²² The undersigned agrees with Ms. Q that there is no "primary" type of transfer under the regulations; all imaginable transfers stand on an equal footing. However, the undersigned does not agree that subsections (A) and (B) of 7 AAC 125.030(b)(2) were necessarily designed to apply to different situations. To determine if a transfer is compensable, the mechanics of the transfer are examined. If the movements involved fall within subsection (A) or subsection (B), the transfer is compensable; otherwise, it is not.

meant to apply, on the other hand, to “vertical transfers” for people who are able to ambulate, whether without assistance or by using a cane, walker, and/or PCA assistance.

Neither Ms. Q's nor the Division's proposed interpretations of 7 AAC 125.030(b)(2) are inherently unreasonable. However, it is possible to harmonize the competing subsections of the transfer regulation simply by strictly construing the regulation according to its express terms.

A hypothetical is useful for analyzing the relationship between the subsections at issue. Suppose you are an ambulatory person. You wake up in bed, are assisted to a standing position, and then walk with assistance to the breakfast table. You sit (with assistance) and eat. Under subsection (A), this constitutes one completed transfer because you have moved from the bed (a surface) to the chair (a different surface). Under subsection (B), this also constitutes one completed transfer, because there was only one instance of moving from a lying or sitting position to a standing position.

Of course, you also received assistance sitting back down. *However*, under the express terms of subsection (B), only "moving from a lying or sitting position to a standing position" constitutes a transfer. *The reverse*, moving from a standing position to a lying or sitting position, *is not defined as a transfer under subsection (B)*. The ALJ erred because he interpreted subsection (B) as including, by implication, moving from a standing position back to a lying or sitting position. However, there is no “and vice-versa” language at the end of subsection (B), and interpreting subsection (B) as also including the reverse of what it expressly states *effectively doubles* the number of resulting transfers. Accordingly, under the proper interpretation of 7 AAC 125.030(b)(2)(B), the recipient receives PCA time for the “standing-up” transfer, *but not for the “sitting-back-down transfer.”*

This "plain language" interpretation of subsection (B) may seem counter-intuitive. However, the Alaska Supreme Court has stated that "[s]tatutory interpretation begins with the plain meaning of the text . . ." ²³ Interpreting 7 AAC 125.030(b)(2)(B) as covering "moving from a lying

²³ *American Marine Corp. v. Sholin*, 295 P.3d 924, 926 (Alaska 2013), *citing State Commercial Fisheries Entry Commission v. Carlson*, 270 P.3d 755, 762 (Alaska 2012). It is true that, in these cases, the Alaska Supreme court further stated that statutory construction should not stop with the plain meaning of the enactment, and that the legislative purpose or intent should also be considered. However, in this case no evidence of the intent of the drafter of the transfer regulation is extant.

or sitting position to a standing position," but not the reverse, is completely consistent with the "plain meaning" rule of statutory construction.²⁴

Interpreting 7 AAC 125.030(b)(2)(B) as providing PCA time for "moving from a lying or sitting position to a standing position," but not the reverse, is also consistent with the principle of *expressio unius est exclusio alterius*. This principle is an intrinsic aid to statutory construction which establishes the inference that, where certain things are designated in a statute, "all omissions should be understood as exclusions."²⁵ The Alaska Supreme Court has stated that "the case for application of *expressio unius est exclusio alterius* is particularly compelling, where [as here] the scheme is purely statutory and without a basis in the common law."²⁶

Finally, the Alaska Supreme Court has adopted the well settled rule of construction that no clause, sentence or word of a statute or regulation shall be construed as inoperative or superfluous, void, or insignificant if an interpretation can be found which will give effect to and preserve all of the words of the statute or regulation.²⁷ The interpretation of 7 AAC 125.030 chosen here gives full effect to both subsections in accordance with this rule of statutory construction.

Ms. Q points out that the definition of "transfer" contained in the CAT *includes* the "to/from" language which, as discussed above, is absent from 7 AAC 125.030(b)(2). Ms. Q is correct that, because the CAT is incorporated into the Division's regulations by reference, it carries the same weight as the Division's other regulations. However, the purpose of the transfers regulation, and the purpose of the CAT, are not the same. The transfers regulation is contained within 7 AAC 125.030, which is explicitly titled "Personal Care Covered Services. 7 AAC 125.030(a) specifically states that "[t]he department will pay a personal care agency . . . for the

²⁴ When a regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning. 1A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 31:6 at 723-24 (6th Ed. 2002); *see also State of Alaska Department of Highways v. Green*, 586 P.2d 595, 603 at n.24 (Alaska 1978) ("[a]dministrative regulations which are legislative in character are interpreted using the same principles applicable to statutes"), citing 1A C. Sands, *Sutherland Statutory Construction*, § 31.06, at 362 (4th ed. 1972) .

²⁵ *Puller v. Municipality of Anchorage*, 574 P.2d 1285, 1287 (Alaska 1978) (*quoting* 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 47.23, at 123 (4th Edition 1973)); *see also* Black's Law Dictionary 620 (8th Edition 2004) ("[t]he canon of statutory construction known as *expressio unius est exclusio alterius* provides that "to express or include one thing implies the exclusion of the other"); *State Department of Revenue v. Deleon*, 103 P.3d 897, 900 (Alaska 2004) ("The principle of *expressio unius est exclusio alterius* directs the court to presume that a statute designating only certain powers excludes those not specifically designated"). The *Puller* decision notes that "[t]he maxim is one of longstanding application, and it is essentially an application of common sense and logic."

²⁶ *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991).

²⁷ *See In re Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1978); *Alascom, Inc., v. North Slope Borough Board of Equalization*, 659 P.2d 1175, 1178 n.5 (Alaska 1983); *City of St. Mary's v. St. Mary's Native Corp.*, 9 P.3d 1002, 1008 (Alaska 2000); *see also* 2A C. Sands, *Statutes and Statutory Construction*, § 46.06 (4th Ed. 1973), and 2A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 46:6 at 244-247 (6th Ed. 2002).

personal care services *identified in this section*" (emphasis added). Thus, the purpose of the transfers regulation is to define those transfers which are compensable. The primary purpose of the CAT, on the other hand, is to *quantify the level of assistance* which a consumer requires with a given activity.²⁸ Because the CAT is not designed (and does not purport) to provide a complete legal definition of any ADL, the inclusion of "to/from" language in the CAT's section on transfers does not require that the transfers regulation be construed as including assistance with moving from a standing position to a lying or sitting position.

In summary, interpreting 7 AAC 125.030(b)(2)(B) as covering "moving from a lying or sitting position to a standing position," but not the reverse, is consistent with multiple rules of statutory construction. It also promotes consistency because, when subsection (B) is so interpreted, a given activity will involve the same number of transfers under subsection (A) as under subsection (B). This interpretation of the PCA "transfers" regulation, 7 AAC 125.030(b)(2), is hereby adopted.

D. The Floor is not a "Surface" for Purposes of 7 AAC 125.030(b)(2)(A)

7 AAC 125.030(b)(2)(A) provides PCA time for transfers when a person requires physical assistance with "moving between one surface and another, including to and from a bed, chair, or wheelchair." Ms. Q asserts that the term "surface" is not defined for purposes of the transfers regulation, and that the floor can constitute a "surface" for purposes of subsection (A).

It is true that the term "surface" is not explicitly defined for purposes of the transfers regulation. However, pursuant to the doctrine of *ejusdem generis*, where a statute or regulation includes a list of items, a general term, when followed by specific terms, will be interpreted in light of the characteristics of the specific terms absent a clear indication to the contrary.²⁹ Beds, chairs, and wheelchairs are all things that sit on the floor and accommodate a person at rest, as opposed to being the floor itself. Accordingly, the language of the transfers regulation, in conjunction with principles of statutory construction, provide an implicit definition of the term "surface." For purposes of 7 AAC 125.030(b)(2)(A), a "surface" includes things like a couch or sofa, but does not include the floor.

²⁸ This is underscored by the fact that the CAT spends approximately one third of a page describing the self-performance and support scores for each ADL, but only one or two lines providing a truncated description of each ADL.

²⁹ See *Black's Law Dictionary* 464 (5th Edition 1979); *State Farm Fire & Casualty Company v. Bongen*, 925 P.2d 1042, 1046 (Alaska 1996); *Cable v. Shefchik*, 985 P.2d 474, 480 (Alaska 1999); *West v. Umialik Insurance Company*, 8 P.3d 1135, 1141 (Alaska 2000); *City of Kenai v. Friends of Recreation Center*, 129 P.3d 452, 459 (Alaska 2006).

E. The Interpretation of Transfers Adopted Here Does not Violate the ADA

Ms. Q asserts that any interpretation of the transfers regulation, which fails to include assistance with moving from a standing position to a lying or sitting position, discriminates between recipients in a manner which violates the Americans with Disabilities Act (ADA).³⁰ 42 U.S.C. § 12132, the statute at the core of the ADA, provides in relevant part as follows:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The ADA precludes public entities from administering programs in ways that have the effect of segregating disabled individuals from the general community.³¹ Known as the “integration mandate,” and codified by regulation, the ADA requires that persons with disabilities receive services in the most integrated setting appropriate to their needs.³² States must implement reasonable modifications to otherwise discriminatory state policies, practices, or procedures, but the ADA does not require states to make modifications that “fundamentally alter” the nature of the service program or activity.³³ The United States Supreme Court has expressly rejected the proposition that the ADA requires states to provide a certain level of benefits to individuals with disabilities; rather, the ADA requires only that states “adhere to the ADA's nondiscrimination requirement *with regard to the services they in fact provide*”³⁴ (emphasis added). Stated differently, the ADA requires only that a particular service provided to some not be denied to disabled people.³⁵ “There is no discrimination under the [ADA] where disabled individuals are given the same opportunity as everyone else.”³⁶

Interpreting 7 AAC 125.030(b)(2)(B) as covering “moving from a lying or sitting position to a standing position,” but not the reverse, is not discriminatory. It merely sets a limitation, equally applicable to all recipients, on the services provided under the PCA program. Accordingly, the interpretation of 7 AAC 125.030(b)(2) adopted here does not violate the ADA.

³⁰ See Ms. Q's post-hearing briefing dated August 25, 2014 at page 3.

³¹ *Olmstead v. L.C. ex. rel. Zimring*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999).

³² 28 C.F.R. § 35.130(d); *Cota v. Maxwell–Jolly*, 688 F.Supp.2d 980, 994 (N.D. Cal. 2010).

³³ 28 C.F.R. § 35.130(b)(7).

³⁴ *Olmstead v. L.C.*, 527 U.S. 581, 603 note 14, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999).

³⁵ See *Doe v. Pfrommer*, 148 F.3d 73, 83 (2nd Cir. 1998).

³⁶ *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000).

F. PCA Program Policy Does not Mandate a Regulatory Interpretation Providing the Greatest Possible Amount of Compensated PCA Services

Ms. Q asserts that interpreting the transfers regulations, as including assistance with moving from a standing position to a lying or sitting position, furthers the purpose of the PCA program, which is to provide assistance to persons with functional impairments.

Providing the additional assistance with transfers suggested by Ms. Q would be ideal. However, as of 2013 Alaska's PCA Program served approximately 5300 recipients statewide.³⁷ At the same time, state revenue has fallen from \$7,352,675,776 in 2012 to \$5,058,667,345 in 2013, a decrease of approximately 31%.³⁸

It is clear that states may not design their Medicaid programs solely on the basis of budgetary considerations, without regard to the requirements of the federal Medicaid statute.³⁹ However, states retain substantial discretion in implementing their Medicaid plans and in choosing the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in the best interests of the recipients.⁴⁰ Accordingly, while an interpretation of the transfers regulation which would include assistance with moving from a standing position to a lying or sitting position might be desirable, such an interpretation is not compelled by state or federal Medicaid law. The undersigned therefore finds it appropriate to construe the transfers regulation in the manner most consistent with its plain language, as discussed in Sections C - E, above.

G. Toileting vs. Transfers

The second main issue raised in this case concerns the proper treatment of certain transfers associated with Ms. Q's toilet use.⁴¹ The ADL of toilet use is defined by regulation as time spent moving to and from the toilet, transfers on and off the toilet, general hygiene care of a colostomy, ileostomy, or external catheter, and the insertion and removal of a nonmedicated suppository, digital

³⁷ See PCA program informational handout at <http://dhss.alaska.gov/dsds/Documents/pca/generalinfohandout.pdf>.

³⁸ See the Alaska Department of Revenue, Tax Division's 2013 Annual Report at page 10, available online at <http://www.tax.alaska.gov/programs/documentviewer/viewer.aspx?1095r>.

³⁹ *Ark. Med. Society v. Reynolds*, 6 F.3d 519, 522 (9th Cir.1993).

⁴⁰ *Alexander v. Choate*, 469 U.S. 287, 303, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985); see also 42 C.F.R. § 440.230(d) (allowing states to “place appropriate limits on service based on such criteria as medical necessity or on utilization control procedures”); see also *Pharmcare Oklahoma, Inc. v. State of Oklahoma Health Care Authority*, 152 P.3d 267 (Ok. 2007) (“[s]tates . . . have broad discretion to adopt standards for determining the extent of medical assistance, with the Act requiring only that the standards be reasonable and consistent with the objectives of the Medicaid Act.”)

⁴¹ These are numbered as events 5 - 16 and 17 - 28 at page 2 of Ms. Q's *Motion for Summary Adjudication* dated April 14, 2014.

stimulation, or other routine incontinence care.⁴² The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.⁴³

Ms. Q seeks transfer time for 12 instances of getting up from a couch to go to the bathroom, and for 12 instances of sitting back down after having gone to the bathroom. The ALJ concluded that these activities were part of the ADL of toileting because they are part of "moving to and from the toilet."⁴⁴ The ALJ cited *In re F.V.*, OAH No. 13-1306-MDS (Commissioner of Health and Social Services 2013) for the proposition that "[t]ransfers 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." Based on *In re F.V.*, the ALJ concluded that the 24 events which Ms. Q describes as daily activities 5-16 and 17-28 are considered part of toileting and do not count as transfers.

The ALJ was correct to rely on *In re F.V.* However, the ALJ misapplied *In re F.V.* to the specific facts of this case. Ms. Q's activities 5-16 (moving from a sitting position on a couch to a standing position, preparatory to walking to the bathroom for toileting) are not transfers in which one of the surfaces is a toilet or commode. Accordingly, activities 5-16 are not part of the ADL of toileting. Rather, they constitute a total of 12 transfers as defined by 7 AAC 125.030(b)(2)(B). Activities 17-28 are also not transfers in which one of the surfaces is a toilet or commode, and so activities 17-28 are also not part of the ADL of toileting. Activities 17-28 are *not* transfers under 125.030(b)(2)(B), because they involve moving from a standing position to a lying or sitting position, instead of moving from a lying or sitting position to a standing position.

H. How Many Transfers are Demonstrated Here Based on the Stipulated Facts?

Based on the principles stated above:

1. The 18 events which Ms. Q describes as daily activities 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 29, 31, 33, and 35 comprise a total of 18 transfers.
2. The 18 events which Ms. Q describes as daily activities 2, 4, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 34, and 36 are not considered part of the ADL of toileting, but also do not count as transfers for the reasons discussed in Section B, above.
3. Ms. Q is therefore entitled to PCA time for 18 transfers per day.

⁴² 7 AAC 125.030(b)(6).

⁴³ The CAT defines toilet use as "[h]ow person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses . . . manages ostomy or catheter, adjusts clothes" (Ex. E9).

⁴⁴ 7 AAC 125.030(b)(6).

II. Revised PCA Award.

In accordance with AS 44.64.060(e)(3), the undersigned revises the quantity of PCA time awarded by the ALJ's proposed decision as follows:

Eighteen of the 36 stipulated daily activities engaged in by Ms. Q fall within the regulatory definition of transfers. These 18 stipulated daily activities comprise a total of 18 transfers per day (126 transfers per week). The parties stipulated that Ms. Q requires PCA assistance with 70% of her transfers. Accordingly, the Division must provide Ms. Q with PCA time for 88 assisted transfers per week. Because the parties stipulated that Ms. Q requires limited one-person assistance with her transfers, this results in a total of 220 minutes of PCA time per week devoted to assistance with transfers.

III. Proposed Decision Adopted as Modified Above.

Except to the extent modified above, all factual findings contained in the ALJ's proposed decision, and all legal conclusions not inconsistent with the above, are hereby adopted. This Commissioner's Decision, and the ALJ's proposed decision dated May 19, 2014 (as modified above), together constitute the final decision of the Commissioner in this case.

APPEAL RIGHTS

This decision is the final administrative action in this proceeding. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 13th day of April, 2015.

By: *Signed*
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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