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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ALISA A. MARTINEZ,	)	1:08-cv-01138-GSA
	)	
Plaintiff,	)	DECISION AND ORDER DENYING
v.	)	PLAINTIFF'S SOCIAL SECURITY
	)	COMPLAINT (DOC. 1)
MICHAEL J. ASTRUE,	)	
COMMISSIONER OF SOCIAL	)	ORDER DIRECTING THE ENTRY OF
SECURITY,	)	JUDGMENT FOR DEFENDANT MICHAEL J.
	)	ASTRUE, COMMISSIONER OF SOCIAL
Defendant.	)	SECURITY, AND AGAINST PLAINTIFF
	)	ALISA A. MARTINEZ
	)	

Plaintiff is proceeding in forma pauperis and with counsel with an action seeking judicial review of a final decision of the Commissioner of Social Security (Commissioner) denying Plaintiff's applications of September 24, 2004, and November 4, 2004, made pursuant to Titles II and XVI of the Social Security Act, for Supplemental Security Income (SSI) benefits and Disability Insurance benefits (DIB), in which she alleged that she had been disabled since December 31, 2002, due to bipolar condition and depression; Plaintiff later requested a closed period of disability from December 31, 2002, through September 28, 2005. (A.R. 15, 94-95, 97-98, 326-28.) The parties have consented to the jurisdiction of the United States Magistrate

1 Judge pursuant to 28 U.S.C. § 636(c)(1), and pursuant to the  
2 order of Judge Lawrence J. O'Neill filed on November 3, 2008, the  
3 matter has been assigned to the Magistrate Judge to conduct all  
4 further proceedings in this case, including the entry of final  
5 judgment.

6 The decision under review is that of Social Security  
7 Administration (SSA) Administrative Law Judge (ALJ) Richard A.  
8 Say, dated March 22, 2008 (A.R. 15-27), rendered after a video  
9 hearing held on February 22, 2008,<sup>1</sup> at which Plaintiff appeared by  
10 video and testified with the assistance of an attorney  
11 representative. A vocational expert (VE) also testified. (A.R.  
12 15, 348-70.)

13 The Appeals Council denied Plaintiff's request for review of  
14 the ALJ's decision on June 10, 2008 (A.R. 5-7), and thereafter  
15 Plaintiff filed the complaint in this Court on August 4, 2008.  
16 Briefing commenced on June 12, 2009, and was completed with the  
17 filing of Plaintiff's reply brief on September 18, 2009. The  
18 matter has been submitted without oral argument to the Magistrate  
19 Judge.

20 I. Jurisdiction

21 This Court has subject matter jurisdiction pursuant to 42  
22 U.S.C. §§ 1383(c)(3) and 405(g), which provide that an applicant  
23 suffering an adverse final determination of the Commissioner of  
24 Social Security with respect to disability or SSI benefits after  
25 a hearing may obtain judicial review by initiating a civil action  
26 in the district court within sixty days of the mailing of the

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27  
28 <sup>1</sup> Plaintiff's failure to appear at an earlier hearing was found to have  
been with good cause. (A.R. 15, 70-71, 342-47.)

1 notice of decision. Plaintiff timely filed her complaint on  
2 August 4, 2008, less than sixty days after the mailing of the  
3 notice of decision on or about June 10, 2008.

4 II. Standard and Scope of Review

5 Congress has provided a limited scope of judicial review of  
6 the Commissioner's decision to deny benefits under the Act. In  
7 reviewing findings of fact with respect to such determinations,  
8 the Court must determine whether the decision of the Commissioner  
9 is supported by substantial evidence. 42 U.S.C. § 405(g).  
10 Substantial evidence means "more than a mere scintilla,"  
11 Richardson v. Perales, 402 U.S. 389, 402 (1971), but less than a  
12 preponderance, Sorenson v. Weinberger, 514 F.2d 1112, 1119, n. 10  
13 (9th Cir. 1975). It is "such relevant evidence as a reasonable  
14 mind might accept as adequate to support a conclusion."  
15 Richardson, 402 U.S. at 401. The Court must consider the record  
16 as a whole, weighing both the evidence that supports and the  
17 evidence that detracts from the Commissioner's conclusion; it may  
18 not simply isolate a portion of evidence that supports the  
19 decision. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9<sup>th</sup> Cir.  
20 2006); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985).  
21 It is immaterial that the evidence would support a finding  
22 contrary to that reached by the Commissioner; the determination  
23 of the Commissioner as to a factual matter will stand if  
24 supported by substantial evidence because it is the  
25 Commissioner's job, and not the Court's, to resolve conflicts in  
26 the evidence. Sorenson v. Weinberger, 514 F.2d 1112, 1119 (9<sup>th</sup>  
27 Cir. 1975).

28 In weighing the evidence and making findings, the

1 Commissioner must apply the proper legal standards. Burkhart v.  
2 Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must  
3 review the whole record and uphold the Commissioner's  
4 determination that the claimant is not disabled if the  
5 Commissioner applied the proper legal standards, and if the  
6 Commissioner's findings are supported by substantial evidence.  
7 See, Sanchez v. Secretary of Health and Human Services, 812 F.2d  
8 509, 510 (9th Cir. 1987); Jones v. Heckler, 760 F.2d at 995. If  
9 the Court concludes that the ALJ did not use the proper legal  
10 standard, the matter will be remanded to permit application of  
11 the appropriate standard. Cooper v. Bowen, 885 F.2d 557, 561 (9<sup>th</sup>  
12 Cir. 1987).

### 13 III. Disability

#### 14 A. Legal Standards

15 In order to qualify for benefits, a claimant must establish  
16 that she is unable to engage in substantial gainful activity due  
17 to a medically determinable physical or mental impairment which  
18 has lasted or can be expected to last for a continuous period of  
19 not less than twelve months. 42 U.S.C. §§ 416(i), 1382c(a)(3)(A).  
20 A claimant must demonstrate a physical or mental impairment of  
21 such severity that the claimant is not only unable to do the  
22 claimant's previous work, but cannot, considering age, education,  
23 and work experience, engage in any other kind of substantial  
24 gainful work which exists in the national economy. 42 U.S.C.  
25 1382c(a)(3)(B); Quang Van Han v. Bowen, 882 F.2d 1453, 1456 (9<sup>th</sup>  
26 Cir. 1989). The burden of establishing a disability is initially  
27 on the claimant, who must prove that the claimant is unable to  
28 return to his or her former type of work; the burden then shifts

1 to the Commissioner to identify other jobs that the claimant is  
2 capable of performing considering the claimant's residual  
3 functional capacity, as well as her age, education and last  
4 fifteen years of work experience. Terry v. Sullivan, 903 F.2d  
5 1273, 1275 (9<sup>th</sup> Cir. 1990).

6 The regulations provide that the ALJ must make specific  
7 sequential determinations in the process of evaluating a  
8 disability: 1) whether the applicant engaged in substantial  
9 gainful activity since the alleged date of the onset of the  
10 impairment, 20 C.F.R. § 404.1520;<sup>2</sup> 2) whether solely on the basis  
11 of the medical evidence the claimed impairment is severe, that  
12 is, of a magnitude sufficient to limit significantly the  
13 individual's physical or mental ability to do basic work  
14 activities, 20 C.F.R. § 404.1520(c); 3) whether solely on the  
15 basis of medical evidence the impairment equals or exceeds in  
16 severity certain impairments described in Appendix I of the  
17 regulations, 20 C.F.R. § 404.1520(d); 4) whether the applicant  
18 has sufficient residual functional capacity, defined as what an  
19 individual can still do despite limitations, to perform the  
20 applicant's past work, 20 C.F.R. §§ 404.1520(e), 404.1545(a); and  
21 5) whether on the basis of the applicant's age, education, work  
22 experience, and residual functional capacity, the applicant can  
23 perform any other gainful and substantial work within the  
24 economy, 20 C.F.R. § 404.1520(f).

25 With respect to SSI, the five-step evaluation process is  
26 essentially the same. See 20 C.F.R. § 416.920.

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28 <sup>2</sup>All references are to the 2008 version of the Code of Federal  
Regulations unless otherwise noted.

1           B. The ALJ's Findings

2           The ALJ found that Plaintiff last met the insured status  
3 requirements of the Social Security Act on December 31, 2007.  
4 (A.R. 17.)

5           The ALJ found that Plaintiff had the severe impairment of  
6 depression, but Plaintiff's alleged personality disorder, post-  
7 traumatic stress disorder (PTSD), bipolar disorder, and  
8 amphetamine-induced psychotic disorder were not severe medically  
9 determinable impairments because they did not endure for the  
10 required continuous, twelve-month period. (A.R. 19-20.) Plaintiff  
11 had no impairment or combination thereof that met or medically  
12 equaled a listed impairment. (A.R. 20.) Plaintiff had no  
13 exertional limitations and could perform at least a full range of  
14 medium exertion level activities with non-exertional limitations  
15 of understanding, remembering, and carrying out only simple,  
16 routine tasks; having only superficial contact with the public  
17 and with only a few co-workers; and working with, independently  
18 of, but not in direct cooperation with, her co-workers. (A.R. 20-  
19 25.) Plaintiff could not perform her past relevant work as an  
20 administrative assistant or clerk, but because she was a younger  
21 individual with a high school education and ability to  
22 communicate in English, and considering her residual functional  
23 capacity (RFC) and work experience, there were jobs that existed  
24 in significant numbers in the national economy, including  
25 assembly worker, production inspector, and checker. (A.R. 25-26.)  
26 Accordingly, Plaintiff was not disabled at any time from the  
27 alleged date of onset of December 31, 2002, through March 22,  
28 2008, the date of decision. (A.R. 27.)

1           C. Plaintiff's Contentions

2           Plaintiff argues that at step two, the ALJ failed to apply  
3 legally correct standards and engaged in improper analysis of the  
4 severity of Plaintiff's PTSD and bipolar disorder by finding that  
5 they had not been shown to have existed for the requisite  
6 duration. Plaintiff argues that because the ALJ considered those  
7 conditions to have been the product of drug use, the ALJ's  
8 analysis ran afoul of the holding in Bustamante v. Massanari, 262  
9 F.3d 949, 954-55 (9<sup>th</sup> Cir. 2001), which precludes application at  
10 step two of 20 C.F.R. §§ 404.1535(a), 416.935(a), relating to  
11 whether or not drug addiction or alcoholism contributed to a  
12 disability.

13           With respect to step four of the sequential analysis and the  
14 formulation of Plaintiff's RFC, Plaintiff argues 1) the ALJ  
15 failed to state clear and convincing reasons for rejecting  
16 Plaintiff's testimony concerning her subjective complaints; 2)  
17 the ALJ failed to state specific, germane reasons for rejecting  
18 the testimony of Plaintiff's mother and stepfather concerning  
19 Plaintiff's limited attention and concentration; and 3) the ALJ  
20 failed adequately to explain the weight he gave to the opinion of  
21 state agency psychiatrist Gene Kester, M.D., and for rejecting  
22 Dr. Kester's limitations, which Plaintiff argues would preclude  
23 employment as demonstrated by the vocational expert's testimony.

24           Plaintiff contends that at step five of the sequential  
25 analysis, the Commissioner's conclusion that jobs were available  
26 was not supported by substantial evidence because the  
27 hypothetical question propounded to the VE was incomplete due to  
28 its omission of an adequate reference to Plaintiff's deficits in

1 attention and concentration.

2 IV. The Medical Evidence

3 From December 2, 2003, through December 5, 2003, Plaintiff  
4 was hospitalized at the Stanislaus Behavioral Health Center  
5 (SBHC) of the Stanislaus County Department of Mental Health,  
6 where Plaintiff was transferred after police had taken her to a  
7 hospital for exhibiting psychotic symptoms, including making a  
8 911 call because she believed she was being pursued by people who  
9 had attached a bomb to her car. (A.R. 159-90, 159, 187.)  
10 Plaintiff reported that for two months she had not taken the  
11 medications she took for her mental illness; she then denied  
12 being mentally ill or having been medicated, which her ex-husband  
13 confirmed, but she reported that she had used amphetamine that  
14 previous night. (A.R. 159, 187.) Her blood tested positive for  
15 amphetamine (A.R. 189), but she "was unable" to provide  
16 information regarding the frequency and extent of her drug use  
17 (A.R. 188). Upon admission, the diagnosis was psychotic disorder,  
18 not otherwise specified, amphetamine abuse, with diagnosis on  
19 Axis II deferred, and a global assessment of functioning (GAF) of  
20 30. (A.R. 187.) Plaintiff believed that neighbors had stolen  
21 significant sums from her, but there were no hallucinations;  
22 memory and concentration were intact, intellect was average, and  
23 insight and judgment were poor. (A.R. 188.) Upon discharge, she  
24 was alert, oriented, talkative, very cooperative, and exhibited  
25 no confusion, disorientation, psychosis, depression, or suicidal,  
26 homicidal, or violent behavior; she did not need any more  
27 evaluation of medication. (A.R. 190.) The diagnosis at discharge  
28 was substance-induced mood disorder, poly-substance dependence;



1 personality disorder, not otherwise specified; with a GAF of 65.  
2 (Id.) Medications for various infections were prescribed. (A.R.  
3 189.)

4 Plaintiff was hospitalized as a result of bronchitis and an  
5 allergic reaction to medication in the middle of December 2003.  
6 (A.R. 191-231, 197, 202, 216, 219.)

7 On July 11, 2004, Plaintiff visited the emergency room of  
8 Doctors Medical Center for family stress, crying, and multiple  
9 somatic complaints. (A.R. 232-47.) The impression was acute and  
10 chronic depression. (A.R. 234.) Plaintiff drove herself to the  
11 SBHC, where Plaintiff was admitted and then discharged on July  
12 13, 2004. Plaintiff was confused, poorly groomed, and  
13 disorganized, and she asserted that her twelve-year-old son had  
14 been stolen. She was described as highly driven, grandiose,  
15 psychotic, labile, and pressured, as well as delusional about  
16 having been harassed. (Id., 239, 244-45.) It was stated that her  
17 urine drug screen was negative (A. R. 244), but it was also noted  
18 that she refused urine for urine toxicology and urinalysis tests  
19 (A.R. 246). Plaintiff related a history of cocaine abuse without  
20 use in sixteen years, and a history of alcohol dependence and a  
21 DUI, but she said she last drank in April 2004. (A.R. 245.) It  
22 was noted on discharge that her behavior was highly driven and  
23 very impulsive with very broad gesturing and constant fidgeting;  
24 her manner was cooperative, but she refused medication; her  
25 insight and judgment were grossly impaired. Her mood was  
26 irritable and dysphoric with a labile affect; her thought process  
27 was tangential at best, with content centered about her delusions  
28 and often loose with pressured speech that was overly loud and

1 emphatic. (A.R. 245-46.) However, it was also noted that by the  
2 date of discharge, Plaintiff's mood and affect improved, her  
3 thought processes were more organized, her mood stable and less  
4 anxious, no agitation or distressed behaviors were observed, and  
5 insight and judgment as well as coping skills for stressors were  
6 better. Her condition was stable to be discharged from the  
7 inpatient unit. No medications were prescribed, but Plaintiff was  
8 to follow up with services. (A.R. 246.)

9       In the discharge summary, Tomonori Fukui, M.D., stated that  
10 the diagnosis upon admission was bipolar I disorder, most recent  
11 episode mixed, severe, with psychotic features, and history of  
12 poly-substance dependence; diagnosis on Axis II was deferred; and  
13 the GAF was 30. (A.R. 244, 247.) The diagnosis on discharge was  
14 adjustment disorder, not otherwise specified, possible brief  
15 psychotic disorder, and past history of poly-substance  
16 dependence, with diagnosis on Axis II deferred, and a GAF of 56.  
17 (Id. at 244.)

18       On September 23, 2004, Sandy Birdlebough, Ph.D., A.R.N.P.,  
19 evaluated Plaintiff on a "crisis psych eval slot" after Plaintiff  
20 had contact with Acute Care. (A.R. 249-52, 274.) Plaintiff  
21 reported three prior admissions to SBHC for evaluation and some  
22 outpatient counseling for depression, but she had never been on  
23 any medications. She cared for her five-year-old daughter, who  
24 had undergone five open-heart surgeries. Plaintiff's speech was  
25 rapid, her ideation was somewhat paranoid and grandiose, and her  
26 thoughts were scattered and yet logical. Plaintiff reported poor  
27 sleep and appetite. She exhibited intact long-term and short-term  
28 memory (although scattered thoughts made it difficult to tell at

1 times), above-average intellect, and poor judgment; she could do  
2 simple calculations but had some difficulty concentrating. (A.R.  
3 250-51.) Dr. Birdlebough's impression was that Plaintiff had been  
4 fairly high functioning up until losing her job in December 2003  
5 and losing her son. She appeared to be quite manic and probably  
6 had been "prodromally manic" for the last several years,  
7 channeling all her energy into caring for a child born with  
8 cardiac anomalies. (A.R. 251.) The diagnosis was bipolar  
9 disorder, not otherwise specified--provisional diagnosis;  
10 diagnosis deferred on Axis II; and the GAF was 42. Plaintiff  
11 agreed to take medication and was given Abilify, with  
12 instructions to return in one week for follow-up. (A.R. 251.)

13       On September 29, 2004, Dr. Birdlebough noted some lessening  
14 of symptoms with less grandiosity and pressured speech; Abilify  
15 was continued, and Lamictal was started. (A.R. 275.) Zoloft was  
16 the subject of a consent form for depression medication in late  
17 October 2004. (A.R. 278.)

18       In November 2004, Plaintiff reported to Yvana Iovino, M.D.,  
19 and Nicolae Oprescu, M.D., at the Yakima Valley Farmworkers  
20 Clinic, that she was doing well, felt better after having started  
21 treatment, had no significant complaints, and would like to go  
22 back to school to go into nursing. Her medications included  
23 Zoloft, Lamictal, and Abilify; Dr. Oprescu noted that her bipolar  
24 disorder was apparently under control on multiple medicines.  
25 (A.R. 254-56.)

26       In December 2004, Plaintiff attended group therapy twice.  
27 (A.R. 281-82.) Dr. Birdlebough's progress note for December 29,  
28 2004, stated that Plaintiff was doing well on current medications

1 with the only side-effect being some daytime drowsiness; moods  
2 were stable; and she slept well, had no thoughts of self-harm,  
3 and had no abnormal movements or complaints of stiffness. She was  
4 "stable on current meds with good mood and sleep." (A.R. 283.)

5 On January 5, 2005, Dr. Birdlebough reported that Plaintiff  
6 had shown marked improvement in all areas, including affect,  
7 concentration, memory, and overall functioning, since beginning  
8 medication. She had also gained insight into the importance of  
9 being on medication; she was sharing childcare and household  
10 duties with her mother. The prognosis was good as long as  
11 Plaintiff continued her medication and counseling. (A.R. 252.)

12 On January 5, 2005, state agency consultant Gene Kester,  
13 M.D., completed a mental functional capacity assessment covering  
14 July 2004 to the date of reporting, as well as a psychiatric  
15 review technique. (A.R. 305-307, 308-21.) In the technique, Dr.  
16 Kester concluded that an RFC assessment was necessary with  
17 respect to Plaintiff's affective disorder, specifically, bipolar  
18 I disorder. (A.R. 308, 311.) In part III of the technique,  
19 entitled "RATING OF FUNCTIONAL LIMITATIONS," and with respect to  
20 the "B" criteria, Dr. Kester assessed mild restriction of  
21 activities of daily living, and moderate difficulties in  
22 maintaining social functioning and maintaining concentration,  
23 persistence, or pace. (A.R. 318.) Dr. Kester concluded that  
24 Plaintiff was moderately limited in the ability to carry out  
25 detailed instructions, maintain attention and concentration for  
26 extended periods, work in coordination with or proximity to  
27 others without being distracted by them, and interact  
28 appropriately with the general public. (A.R. 305-07.) With

1 respect to understanding and memory, Plaintiff exhibited no  
2 significant impairment of memory even when in a hypomanic state.  
3 With respect to sustained concentration and persistence, she had  
4 somewhat limited concentration but could carry out routine tasks  
5 on a routine, daily basis. She might be distracted by excess  
6 stimulation until further stabilized on medications, and she  
7 would work best with a limited number of coworkers, performing  
8 relatively independent tasks; however, she could persist  
9 throughout a daily/weekly schedule. With respect to social  
10 interaction, she might have superficial contact with the public.  
11 As to adaptation, she could travel, plan, avoid hazards, and  
12 adapt to routine changes; she was intelligent and had a good work  
13 history before her illness. (A.R. 307.)

14 Plaintiff experienced symptoms of near-syncope in January  
15 2005 that were treated with Propranolol. (A.R. 258.) Plaintiff  
16 attended another group therapy session and completed her goal-  
17 setting group on January 24, 2005. (A.R. 284, 288.)

18 For Plaintiff's experiences of near-syncope, Clonazepam was  
19 prescribed in March 2005 on the assumption that the symptoms  
20 might be consistent with panic attacks, although there was a very  
21 low possibility of arrhythmias. (A.R. 258, 261.) Plaintiff began  
22 individual therapy on March 17, 2005, with Joyce Ruff-Delgado,  
23 M.S., L.M.H.C., therapist. Plaintiff was given information on  
24 bipolar disorder. (A.R. 289.)

25 On March 30, 2005, Rodolfo Trivisonno, M.D., reported a  
26 change in the diagnosis to post-traumatic stress disorder,  
27 neurotic depression, bipolar by history, amphetamine abuse in  
28 current early remission, amphetamine-induced psychotic disorder

1 in remission, with diagnosis deferred on Axis II; the GAF was 60.  
2 (A.R. 291.) The plan was to prevent substance abuse relapse,  
3 control panic and psychotic symptoms, and continue with  
4 medications. (A.R. 291.) On April 18, 2005, at a case staffing  
5 meeting, the diagnosis of PTSD was reiterated. (A.R. 293.)  
6 However, therapist Ruff-Delgado recorded a bipolar diagnosis on  
7 April 19, 2005, noted Plaintiff's scores on "self-tests,"  
8 including 7/12 and 18/27 on depression, 16/19 on PTSD, and 11/16  
9 on anxiety, and further characterized the results on the OCD  
10 self-test as endorsing contamination, hoarding, symmetry,  
11 aggressive, and religious cleaning/washing compulsions. It was  
12 noted that Plaintiff reported many symptoms associated with  
13 possible diabetes, and she admitted that her diet was filled with  
14 sugar, caffeine, and carbohydrates. Plaintiff also reported that  
15 she had applied and interviewed for several positions recently  
16 and was hoping to be called soon. (A.R. 294.)

17 On April 20, 2005, Dr. Trivisonno reiterated his changed  
18 diagnosis of PTSD, etc., and noted that Plaintiff was oriented,  
19 calmer, less depressed, and reported no psychotic symptoms and  
20 good sleep with mild daytime sedation but no other side-effects.  
21 She was cognitively improved. The GAF was 65. (A.R. 295.) Dr.  
22 Trivisonno discontinued the Abilify because of an absence of  
23 psychotic symptoms, and continued Lamictal for mood  
24 stabilization, Zoloft for depression, and Clonazepam for anxiety  
25 and insomnia. (Id.) Plaintiff was encouraged to develop realistic  
26 expectations and to continue with therapy and relapse prevention.  
27 (A.R. 295.)

28 In May 2005, Dr. Trivisonno reiterated his diagnosis without

1 change, assessed Plaintiff's GAF as 70, and noted that Plaintiff  
2 was oriented, calmer, cooperative, well-groomed, with an affect  
3 reflecting that she was feeling better; she was cognitively  
4 improved and suffered no psychotic symptoms or mania. Medications  
5 and education were continued. (A.R. 298.) On May 26, 2005, in a  
6 visit for medication management, Dr. Trivisonno diagnosed PTSD,  
7 chronic; neurotic depression; amphetamine abuse; and amphetamine-  
8 induced psychotic disorder in remission, with no diagnosis on  
9 Axis II; the GAF was 70. (A.R. 299.) Plaintiff was alert, fully  
10 oriented, calm and cooperative, well groomed, and with a stable  
11 mood reflecting that she felt better. She reported sleep  
12 disturbed by worries concerning a custody battle with her ex-  
13 husband and by her depression over marital abuse that triggered  
14 her substance abuse. She was cognitively improved, with no  
15 psychotic symptoms and no mania. Medications and education were  
16 continued. (A.R. 299.)

17 In July 2005, Plaintiff was transferred to a new case  
18 manager, who noted continuing problems with depression stemming  
19 from her problems with children and prior relationships. The  
20 diagnosis remained PTSD. (A.R. 302.) Plaintiff failed to appear  
21 for case and medication management appointments in the late  
22 spring and summer of 2005. (A.R. 296-97, 303-04.)

23 On August 24, 2005, state agency medical consultant James E.  
24 Bailey, Ph.D., reviewed all the evidence in the file and Dr.  
25 Kester's assessment of January 5, 2005, and affirmed Dr. Kester's  
26 assessment. (A.R. 307, 318.)

27 V. Plaintiff's Testimony

28 At the hearing held on February 22, 2008, Plaintiff

1 testified that she was forty-one years old, a high school  
2 graduate, and unmarried; she did in-home health support services  
3 for 32.2 hours for her own daughter, and that activity had been  
4 ongoing since 1999. (A.R. 352-53, 362-63.) Further, she worked  
5 the Christmas season briefly for Toys R Us in 2005. (A.R. 352.)  
6 Plaintiff lived with her two children, aged six and eight. She  
7 could read and understand newspaper articles, write notes and  
8 letters to people, and figure out what change she should receive  
9 at the store when buying something. (A.R. 354.) She lost her job  
10 in 2002, was first hospitalized in December 2003, was  
11 hospitalized the second time in 2004, and last used drugs in  
12 2005. (A.R. 357-58.) She testified that she was not using  
13 amphetamines at the time of alleged onset (December 31, 2002),  
14 but she also admitted that reports about amphetamine abuse were  
15 not incorrect. (A.R. 355.) Before she lost her job she was in  
16 counseling. (A.R. 358.) She could not have held down a forty-hour  
17 a week job from 2002 through 2005 because she was very emotional;  
18 she needed to take care of her daughter, lost her income, her  
19 child's father lost his income, and Plaintiff had to sell her  
20 home. (A.R. 361.)

21 VI. Lay Evidence

22 Plaintiff's mother completed an adult function report on  
23 November 19, 2004 (A.R. 123-31), in which she reported spending  
24 ten hours a day with Plaintiff, with whom she cooked and  
25 completed normal activities. Plaintiff needed to be reminded  
26 about doctor's appointments for herself and the children and to  
27 take her medicine every day. Plaintiff prepared simple meals and  
28 did cleaning and laundry, but Plaintiff had no energy; she hardly



1 ever went out except to feed the dogs. She walked and drove a car  
2 but did not go out alone. She shopped monthly at the grocery  
3 store; she had a problem concentrating and used cash. She walked  
4 the kids and dogs with others weekly, went to the park, and had  
5 no problems getting along with family, friends, neighbors, or  
6 others. Plaintiff was irritable; she had a problem remembering  
7 things she was supposed to do and could not concentrate on  
8 paperwork. She could not pay attention for too long and did not  
9 finish what she started. She could follow written and spoken  
10 instructions very well, and got along well with bosses and  
11 teachers, but not others. She had never been fired, did not  
12 handle stress or changes in routine very well at all, and was  
13 unusually afraid of being alone. (A.R. 123-31.)

14 Plaintiff's stepfather, Raymond R. Ortiz, completed an adult  
15 function report on November 19, 2004, based on his having known  
16 Plaintiff for thirteen years and talking with her. (A.R. 132-40.)  
17 Plaintiff prepared breakfast for the children, clothed them,  
18 bathed them at night, and took care of animals. She could no  
19 longer work, do her finances, and take care of the home; her  
20 sleep was interrupted at night, and she slept off and on during  
21 the day. Plaintiff needed to be reminded to take her medicine.  
22 She made simple meals a couple of times a week, lacked energy,  
23 could do laundry and clean her room and the living room, but she  
24 sometimes forgot to finish. She did not go out much and never  
25 went out without someone with her; she shopped at the grocery  
26 store monthly, and using a checkbook confused her, but her  
27 ability to handle money had not changed. She walked the dogs and  
28 walked with the children, went to the park, and had no problems

1 getting along with others. Her memory and concentration were  
2 affected; she forgot and could not concentrate; she could pay  
3 attention very little and did not get along with police or  
4 landlords. She could not handle stress and did not handle changes  
5 in routine well. She did not want to be alone going places. (Id.)

6 VII. Vocational Expert's Testimony

7 Daniel McKinney, a vocational expert, testified that he had  
8 studied the vocational materials in the record; Plaintiff's past  
9 relevant work as an administrative clerk was light, semi-skilled  
10 work pursuant to the Dictionary of Occupational Titles (DOT).  
11 (A.R. 364-65.)

12 McKinney testified that an individual who was forty-one  
13 years old, with a high school education, the ability to read,  
14 write, and use numbers, and Plaintiff's work history, and who  
15 could perform at least medium exertional work, with some mental  
16 impairments such that she was capable of understanding,  
17 remembering, and carrying out simple, routine tasks, should have  
18 only superficial interaction with the public and coworkers, and  
19 probably be limited to working with only a few coworkers and  
20 working relatively independently but not cooperatively with  
21 others, could not perform Plaintiff's past, semi-skilled work.  
22 (A.R. 365.) However, such a person could probably perform  
23 unskilled occupations, typically in a production environment,  
24 such as assembly, with 16,000 jobs consistent with the  
25 hypothetical in the tri-state region of Washington, Oregon, and  
26 Idaho at sedentary and light, and some expansion of that for  
27 medium, and 600,000 in the national economy at sedentary and  
28 light. (A.R. 365-66.) The DOT job titles in that category were

1 electronics workers, DOT number 726.687-010, and small products  
2 assemblers, DOT number 739.687-030. (A.R. 366.)

3 McKinney continued his response to the initial question,  
4 stating that a second category of jobs would be production  
5 inspectors and checkers, with approximately 4,000 jobs consistent  
6 with the hypothetical in the tri-state region, and approximately  
7 140,000 in the national economy, with job title examples from  
8 that prior category including inspector of small parts and  
9 products, DOT number 733.687-042, and weld inspector, DOT number  
10 724.685-014. (A.R. 366.)

11 When asked if those jobs were consistent with the DOT, the  
12 VE replied affirmatively. (A.R. 366.)

13 The ALJ posed another hypothetical based on the "testimony  
14 today." (A.R. 366-67.) He directed the VE to assume that the  
15 testimony was consistent with medical evidence in the record, and  
16 asked if such an individual would be able to perform any of  
17 Plaintiff's past work. The VE responded in the negative because  
18 of the distractibility, inability to focus, and level of  
19 dysfunction that she described. (A.R. 367.)

20 Plaintiff's counsel posed another hypothetical, positing an  
21 individual with Plaintiff's age, education, past relevant work  
22 experience, with "significant interference in" their ability to  
23 maintain attention and concentration for extended periods and a  
24 "significant interference with" their ability to carry out  
25 detailed instructions, a "significant interference" with their  
26 ability to work in coordination with or proximity to others  
27 without being distracted by them, and a "significant  
28 interference" in their ability to interact appropriately with the

1 general public. (A.R. 367.) The ALJ stated that "we should define  
2 what a significant interference is." (A.R. 368.) The following  
3 colloquy occurred:

4 ATTY: Yeah. I just say just use the dictionary definition  
5 or the vocational definition of how significant interference  
with basic daily ac - basic work activities in those areas.

6 ALJ: Are those limits off of any of these forms in the file  
7 or?

8 BY ATTORNEY:

9 Q. Yes. They're off of 12F, Your Honor. And significant  
10 interference is off of the Social Security Regulations and  
Rulings that say a moderate limitation is a severe  
impairment, and severe is defined as, you know,  
significant interference.

11 A In my opinion, a person with that profile would not  
12 be able to maintain competitive employment.

(A.R. 368.)

13 VII. The ALJ's Analysis of the Severity of Plaintiff's  
14 Impairments

15 A. Legal Standards

16 At step two, the Commissioner considers if claimant has "an  
17 impairment or combination of impairments which significantly  
18 limits his physical or mental ability to do basic work  
19 activities." 20 C.F.R. §§ 404.1520(c), 416.920(c). This is  
20 referred to as the "severity" requirement and does not involve  
21 consideration of the claimant's age, education, or work  
22 experience. Id. The step-two inquiry is a de minimis screening  
23 device to dispose of groundless claims. Bowen v. Yuckert, 482  
24 U.S. 153-54 (1987). The Secretary is required to "consider the  
25 combined effect of all of the individual's impairments without  
26 regard to whether any such impairment, if considered separately,  
27 would be of [sufficient medical] severity." 42 U.S.C. §  
28 1382c(a)(3)(F).

1 Basic work activities include the abilities and aptitudes  
2 necessary to do most jobs, such as physical functions of walking,  
3 standing, sitting, lifting, pushing, pulling, reaching, carrying,  
4 or handling; capacities for seeing, hearing, and speaking;  
5 understanding, carrying out, and remembering simple instructions;  
6 use of judgment; responding appropriately to supervision, co-  
7 workers and usual work situations; and dealing with changes in a  
8 routine work setting. 20 C.F.R. §§ 404.1521(b), 416.921(b).

9 An impairment or combination thereof is not severe when  
10 medical evidence establishes only a slight abnormality or a  
11 combination of slight abnormalities which would have no more than  
12 a minimal effect on an individual's ability to work. An  
13 impairment is not severe if it does not significantly limit a  
14 claimant's physical or mental ability to do basic work  
15 activities. 20 C.F.R. §§ 404.1521(a), 416.921(a); Soc. Sec.  
16 Ruling 85-28; Smolen v. Chater, 80 F.3d 1273, 1289-90 (9<sup>th</sup> Cir.  
17 1996).

18 An impairment must last or be expected to last at least  
19 twelve continuous months. 20 C.F.R. §§ 404.1509, 416.909.  
20 Further, the inability to work caused by the impairment must last  
21 at least twelve continuous months. Barnhart v. Walton, 535 U.S.  
22 212, 214-22 (2002).

23 B. The ALJ's Findings at Step Two

24 The ALJ concluded that Plaintiff's depressive disorder was  
25 Plaintiff's only severe, medically determinable impairment. (A.R.  
26 20.) He reasoned:

27 The claimant's alleged personality disorder, post  
28 traumatic stress disorder (PTSD), bipolar disorder  
and amphetamine-induced psychotic disorder are not

1 severe medically determinable impairments as defined  
2 in the Social Security Act. Those conditions were of  
3 a relatively short duration, lasting less than the  
4 required 12 months continuous period, and they were  
5 no longer present after the claimant stopped the use  
6 of amphetamines. The claimant's alleged manic symptoms  
7 were later denied by the claimant once she was started  
8 taking medications and she stopped taking crack and  
9 amphetamines, leaving only some depressive symptoms.  
10 The claimant's allegations of former spousal abuse  
11 and likely post traumatic stress disorder symptoms  
12 were not indicated in the record to be continuing  
13 and they are not well substantiated in the record.

8 There are no quantitative psychological test results  
9 in the record, other than clinical interview reports  
10 and a hospitalization for substance-induced mood  
11 disorder, indicating any treatment for any mental  
12 impairments prior to September 2004 and none after  
13 May 2005. However, looking at the evidence in the  
14 light most favorable to the claimant, the undersigned  
15 finds the claimant to have a severe medically determinable  
16 impairment of a depressive disorder but no other finding  
17 of any other severe medically determinable physical or  
18 mental impairment.

14 (A.R. 20.)

15 C. Analysis

16 The ALJ's conclusion that any personality disorder and  
17 amphetamine-induced psychotic disorder and their effects did not  
18 endure for the necessary twelve-month period is supported by  
19 substantial evidence. Plaintiff experienced a single episode of  
20 extreme symptoms that endured at most for several days, and this  
21 prompted the diagnosis; however, the symptoms quickly ceased when  
22 the drug use ceased. The diagnosis was not repeated except to be  
23 noted as being in a state of remission.

24 With respect to the bipolar disorder, a diagnosis of bipolar  
25 disorder appeared on Plaintiff's hospital visit in July 2004, but  
26 upon discharge it had been revised to adjustment disorder, not  
27 otherwise specified. It was Dr. Birdleough who provisionally  
28 diagnosed bipolar disorder in September 2004, and began giving

1 Plaintiff medication for it. However, she treated Plaintiff for  
2 multiple conditions, including depression. By March 2005, Dr.  
3 Trivisonno had changed the diagnosis to PTSD, depression, and  
4 amphetamine-induced psychotic disorder; Plaintiff's treatment was  
5 modified to eliminate medicines for psychotic symptoms, but to  
6 continue treatment for depression and for mood stabilization.

7 The record also supports the ALJ's finding that Plaintiff  
8 had denied having continuing manic-type symptoms, and that  
9 depressive symptoms remained.

10 Thus, substantial evidence supported the ALJ's conclusion  
11 that any bipolar disorder and its effects did not endure for the  
12 requisite twelve-month period.

13 As to Plaintiff's PTSD, Dr. Trevisonno's diagnosis came in  
14 March 2005. The record thus supports the ALJ's finding concerning  
15 the duration of Plaintiff's PTSD. As the ALJ specifically noted,  
16 there were no quantitative psychological tests results in the  
17 record indicating treatment for mental impairments before  
18 September 2004 or after May 2005. Likewise, as the ALJ noted,  
19 there were only limited references to Plaintiff's alleged former  
20 spousal abuse.

21 The Court therefore concludes that the ALJ's analysis of the  
22 severity of Plaintiff's mental impairments proceeded according to  
23 correct legal standards and was supported by substantial  
24 evidence.

25 D. Consideration of Drug Abuse

26 It is within this context that the Court addresses  
27 Plaintiff's contention that the ALJ erred in considering  
28 Plaintiff's non-severe impairments to have been the product of

1 drug use. Plaintiff relies on Bustamante v. Massanari, 262 F.3d  
2 949, 954-55 (9<sup>th</sup> Cir. 2001), which precludes application at step  
3 two of 20 C.F.R. §§ 404.1535(a), 416.935(a), relating to whether  
4 or not drug addiction or alcoholism contributed to a disability.  
5 These regulations relate to statutory provisions which render a  
6 claimant ineligible for SSI or DIB if drug and/or alcohol abuse  
7 are a material factor in a finding of disability. The court in  
8 Bustamante v. Massanari addressed the appropriate way to apply  
9 these regulations and concluded that it was improper to apply  
10 them at step two, and that Congress had intended that the  
11 consideration occur only after an impairment had already been  
12 found, at later stages of the sequential analysis, to result in a  
13 disability.

14 Here, as the foregoing analysis demonstrates, the ALJ was  
15 engaging in a different analysis. The ALJ was assessing the  
16 duration of various conditions and their effects in order to set  
17 forth his reasoning and to articulate required findings  
18 concerning the severity and duration of Plaintiff's various  
19 impairments. The ALJ was not engaging in a prohibited truncation  
20 of analysis with respect to conditions that were otherwise  
21 disabling.

22 Accordingly, the Court rejects Plaintiff's arguments  
23 concerning the ALJ's analysis at step two.

#### 24 VIII. Credibility Findings

25 The ALJ found that although Plaintiff's medically  
26 determinable impairment could reasonably have been expected to  
27 produce the alleged symptoms, Plaintiff's statements concerning  
28 the intensity, persistence, and limiting effects of the symptoms



1 were not credible to the extent that they were inconsistent with  
2 the RFC adopted by the ALJ. (A.R. 23.)

3 Plaintiff argues that the ALJ failed to state clear and  
4 convincing reasons for rejecting the extent of Plaintiff's  
5 subjective complaints of severe highs and lows, panic, anxiety,  
6 depression, and poor concentration.

7 A. Legal Standards

8 It is established that unless there is affirmative evidence  
9 that the applicant is malingering, then where the record includes  
10 objective medical evidence establishing that the claimant suffers  
11 from an impairment that could reasonably produce the symptoms of  
12 which the applicant complains, an adverse credibility finding  
13 must be based on clear and convincing reasons. Carmickle v.  
14 Commissioner, Social Security Administration,, 533 F.3d 1155,  
15 1160 (9<sup>th</sup> Cir. 2008). In Orn v. Astrue, 495 F.3d 625, 635 (9<sup>th</sup> Cir.  
16 2007), the court summarized the pertinent standards for  
17 evaluating the sufficiency of an ALJ's reasoning in rejecting a  
18 claimant's subjective complaints:

19 An ALJ is not "required to believe every  
20 allegation of disabling pain" or other non-exertional  
21 impairment. See Fair v. Bowen, 885 F.2d 597, 603 (9th  
22 Cir.1989). However, to discredit a claimant's testimony  
23 when a medical impairment has been established, the ALJ  
24 must provide "'specific, cogent reasons for the  
25 disbelief.'" Morgan, 169 F.3d at 599 (quoting Lester,  
81 F.3d at 834). The ALJ must "cit[e] the reasons why  
the [claimant's] testimony is unpersuasive." Id. Where,  
as here, the ALJ did not find "affirmative evidence"  
that the claimant was a malingerer, those "reasons for  
rejecting the claimant's testimony must be clear and  
convincing." Id.

26 Social Security Administration rulings specify the  
27 proper bases for rejection of a claimant's testimony.  
28 See S.S.R. 02-1p (Cum. Ed.2002), available at Policy  
Interpretation Ruling Titles II and XVI: Evaluation of  
Obesity, 67 Fed.Reg. 57,859-02 (Sept. 12, 2002); S.S.R.

1 96-7p (Cum. Ed.1996), available at 61 Fed.Reg.  
2 34,483-01 (July 2, 1996). An ALJ's decision to reject a  
3 claimant's testimony cannot be supported by reasons  
4 that do not comport with the agency's rules. See 67  
5 Fed.Reg. at 57860 ("Although Social Security Rulings do  
6 not have the same force and effect as the statute or  
7 regulations, they are binding on all components of the  
8 Social Security Administration, ... and are to be  
9 relied upon as precedents in adjudicating cases."); see  
10 Daniels v. Apfel, 154 F.3d 1129, 1131 (10th Cir.1998)  
11 (concluding that ALJ's decision at step three of the  
12 disability determination was contrary to agency  
13 regulations and rulings and therefore warranted  
14 remand). Factors that an ALJ may consider in weighing a  
15 claimant's credibility include reputation for  
16 truthfulness, inconsistencies in testimony or between  
17 testimony and conduct, daily activities, and  
18 "unexplained, or inadequately explained, failure to  
19 seek treatment or follow a prescribed course of  
20 treatment." Fair, 885 F.2d at 603; see also Thomas, 278  
21 F.3d at 958-59.

22 Additional factors to be considered in weighing credibility  
23 include the location, duration, frequency, and intensity of the  
24 claimant's pain or other symptoms; factors that precipitate and  
25 aggravate the symptoms; the type, dosage, effectiveness, and side  
26 effects of any medication the claimant takes or has taken to  
27 alleviate the symptoms; treatment, other than medication, the  
28 person receives or has received for relief of the symptoms; any  
measures other than treatment the claimant uses or has used to  
relieve the symptoms; and any other factors concerning the  
claimant's functional limitations and restrictions due to pain or  
other symptoms. 20 C.F.R. §§ 404.1529, 416.929; S.S.R. 96-7p.

#### 23 B. The ALJ's Reasoning

24 The ALJ noted Plaintiff's inconsistent testimony concerning  
25 whether or not she had been using amphetamines or other illicit  
26 drugs at the time of the alleged onset date of disability, and  
27 her admission that she had worked for income from the state and  
28 during the 2005 Christmas season. (A.R. 22.) The ALJ also noted

1 Plaintiff's failure to provide any records or information that  
2 would enable procurement of records of treatment she allegedly  
3 received before her alleged onset date. (A.R. 24.)

4 Included in the factors that an ALJ may consider in weighing  
5 a claimant's credibility are the claimant's reputation for  
6 truthfulness; inconsistencies either in the claimant's testimony  
7 or between the claimant's testimony and the claimant's conduct,  
8 daily activities, or work record; and testimony from physicians  
9 and third parties concerning the nature, severity, and effect of  
10 the symptoms of which the claimant complains. Thomas v. Barnhart,  
11 278 F.3d 947, 958-59 (9<sup>th</sup> Cir. 2002). The ALJ may consider whether  
12 the Plaintiff's testimony is believable or not. Verduzco v.  
13 Apfel, 188 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999).

14 Here, the ALJ's reliance on the basic inconsistencies in the  
15 evidence was supported by the record and was clear and convincing  
16 in force.

17 The ALJ detailed Plaintiff's testimony concerning inability  
18 to work because of being too emotional, financial problems,  
19 relationship problems, illness of a daughter, and identity theft.  
20 (A.R. 23.) The ALJ noted the allegations made in Plaintiff's  
21 application for benefits that work-like activities were precluded  
22 because of worsening depression, bipolar disorder, medications,  
23 stress, and having two disabled daughters. (A.R. 23, 97-98.) The  
24 ALJ noted Plaintiff's reported activities of daily living,  
25 including caring for her two young daughters and for her own  
26 personal needs, and performing household chores such as cooking  
27 meals with several courses. (A.R. 23, 116-17.) The ALJ mentioned  
28 Plaintiff's alleged difficulty sleeping, need for reminders for

1 medication and appointments, inability to go out alone due to  
2 side-effects of medications, report of becoming frustrated while  
3 driving, need for motivation to complete tasks, and memory and  
4 concentration difficulties. (A.R. 23, 117-20.) The ALJ also noted  
5 that on her appeal questionnaires, Plaintiff reported that her  
6 bipolar disorder was causing her to have severe highs and lows  
7 and to experience anxiety, panic, depression, fainting spells,  
8 and poor concentration, but she was still capable of caring for  
9 her own needs. (A.R. 23, 144-58, 144, 148, 151, 155.) The ALJ  
10 then stated his finding that Plaintiff's subjective complaints  
11 were incredible to the extent inconsistent with the RFC assessed  
12 by the ALJ. (A.R. 23.)

13         The ALJ then articulated various reasons for his findings.  
14 He stated that the record did not support a conclusion that  
15 Plaintiff had more than mild to moderate mental impairment  
16 symptoms since her alleged onset date, and most of those symptoms  
17 lasted no longer than a few days. (A.R. 24.) He noted that the  
18 medical records did not support her claim of having been too  
19 emotional to work and having difficulty leaving the house alone.  
20 (A.R. 24.) The ALJ noted the paucity of documentation of any  
21 episodes of severe limitation except during two very brief  
22 hospitalizations. (A.R. 23.) He referred to the substantial  
23 improvement noted by Dr. Birdlebough within a single week after  
24 Plaintiff's initial report, the course of marked improvement in  
25 all areas noted three months later, Plaintiff's own reports to  
26 her primary care physician in November 2004 that she had no  
27 significant complaints and felt better after starting treatment,  
28 and her appropriate appearance upon examination. (A.R. 23.) The

1 ALJ focused on the opinions of acceptable medical sources, such  
2 as Dr. Trivisonno, a psychiatrist (as contrasted with Joyce Ruff-  
3 Delgado, LMHC, who was not an acceptable medical source), and  
4 reviewed the longitudinal GAF scores, interpreting the evidence  
5 as reflecting severe symptoms that were only short-lived or  
6 subjectively based and thus overrated. (A.R. 23-24.) The ALJ  
7 noted that within months, Plaintiff improved to mild  
8 symptomatology, reaching a GAF of 70, indicating some mild  
9 symptoms and "if one point higher, would indicate that symptoms,  
10 if present at all, would be transient and expected reactions to  
11 psychosocial stressors with no more than slight impairment in  
12 social, occupational and school functioning." (A.R. 24.) The ALJ  
13 stated that most of the medical opinions regarding Plaintiff's  
14 functioning level indicated only mild symptoms, which would  
15 equate to generally functioning well. (A.R. 24.)

16 As the previous summary of the medical evidence reveals,  
17 this reasoning was supported by the record. Further, it was clear  
18 and convincing. Although the inconsistency of objective findings  
19 with subjective claims may not be the sole reason for rejecting  
20 subjective complaints of pain, Light v. Chater, 119 F.3d 789, 792  
21 (9<sup>th</sup> Cir. 1997), it is one factor which may be considered with  
22 others, Moisa v. Barnhart, 367 F.3d 882, 885 (9<sup>th</sup> Cir. 2004);  
23 Morgan v. Commissioner 169 F.3d 595, 600 (9<sup>th</sup> Cir. 1999). Here,  
24 the ALJ's evaluation of Plaintiff's subjective claims found  
25 strong support in the medical record.

26 In rejecting Plaintiff's claim that she was too emotional to  
27 work and was having trouble leaving the house alone, the ALJ  
28 noted that Plaintiff had managed to maintain a home for her two

1 young children and care for them, including receiving payments  
2 from the state for care. (A.R. 24.) The ALJ also noted  
3 Plaintiff's report in April 2005 that she had applied and  
4 interviewed for positions. (A.R. 24.) A claimant's ability to  
5 engage in activities of daily living to the extent that he or she  
6 spends a substantial part of his day engaged in pursuits  
7 involving the performance of physical functions that are  
8 transferable to the work setting is relevant; a specific finding  
9 as to this fact may be sufficient to discredit a claimant's  
10 allegations. Morgan v. Commissioner of Social Sec. Admin., 169  
11 F.3d 595, 600 (9<sup>th</sup> Cir. 1999); Thomas v. Barnhart, 278 F.3d 947,  
12 959 (9<sup>th</sup> Cir. 2002). In Curry v. Sullivan, 925 F.2d 1127, 1130 (9<sup>th</sup>  
13 Cir. 1990), the court specifically concluded that an ability to  
14 take care of one's personal needs, prepare easy meals, do light  
15 housework, and shop for some groceries may be seen as  
16 inconsistent with the presence of a condition that would preclude  
17 all work activity (citing Fair v. Bowen, 885 F.2d 597, 604 (9<sup>th</sup>  
18 Cir. 1989)).

19 Here, in light of Plaintiff's long history of functioning  
20 sufficiently well to care for her disabled children and to  
21 collect income for her care-taking activities, the ALJ's  
22 reasoning was clear and convincing.

23 Accordingly, the Court concludes that the ALJ cited  
24 multiple, clear and convincing reasons for rejecting Plaintiff's  
25 subjective complaints regarding the intensity, duration, and  
26 limiting effects of her symptoms, and that the ALJ's reasons were  
27 properly supported by the record and sufficiently specific to  
28 allow this Court to conclude that the ALJ rejected the claimant's

1 testimony on permissible grounds and did not arbitrarily  
2 discredit Plaintiff's testimony.

3 IX. Lay Evidence

4 Plaintiff argues that the ALJ failed to state specific  
5 reasons germane to each witness in rejecting the statements of  
6 Plaintiff's mother and stepfather.

7 The ALJ stated the following:

8 In addition to the claimant's testimony and application  
9 and appeal statements, the record also contains the  
10 written questionnaires completed in November 2004 by  
11 the claimant's mother and stepfather. The claimant's  
12 mother, Lupe Martinez, stated that when the claimant  
13 first came to live with her, the claimant did not sleep  
14 but she was doing better. Mrs. Martinez stated the  
15 claimant had no problems caring for her personal needs or  
16 in taking care of her daughters' needs but she daily  
17 reminded the claimant to take her medications. She noted  
18 the claimant rarely left the home and never left alone.  
19 Specifically, she noted the claimant to be irritable, to  
20 have memory attention and concentration difficulties and  
21 to not handle stress or change well. The claimant's  
22 step-father, Raymond Ortiz, noted essentially the same  
23 observations as the claimant's mother. (Citation omitted.)

24 The undersigned has carefully considered the statements  
25 from the claimant's mother and stepfather and give (sic)  
26 some weight relative to their account of their observations  
27 of the claimant but not to any conclusions reached from  
28 those observations because they were not provided by  
29 medically trained personnel; they are based on the  
30 claimant's subjective complaints; and they are in-  
31 consistent with the record as a whole.

32 (A.R. 24-25.)

33 Lay witnesses, such as friends or family members in a  
34 position to observe a claimant's symptoms and daily activities,  
35 are competent to testify to a claimant's condition; the  
36 Commissioner will consider observations by non-medical sources as  
37 to how an impairment affects a claimant's ability to work.

38 Dodrill v. Shalala, 12 F.3d 915, 918-19 (9<sup>th</sup> Cir. 1993). An ALJ  
cannot discount testimony from lay witnesses without articulating

1 specific reasons for doing so that are germane to each witness.  
2 Id. at 919. It is appropriate for an ALJ to rely on medical  
3 evidence in rejecting inconsistent testimony. Lewis v. Apfel, 236  
4 F.3d 503, 511-12 (9<sup>th</sup> Cir. 2001); Thomas v. Barnhart, 278 F.3d  
5 947, 958-59 (9<sup>th</sup> Cir. 2002). It is permissible for an ALJ who has  
6 rejected a claimant's subjective complaints to reject similar  
7 evidence from third-party lay witnesses that is subject to the  
8 same reasoning. Valentine v. Commissioner of the Soc. Sec.  
9 Admin., 574 F.3d 685, 693-94 (9<sup>th</sup> Cir. 2009).

10 Here, the ALJ stated germane reasons concerning  
11 inconsistency with the record as a whole and the evidence's being  
12 based on the claimant's subjective complaints. The Court thus  
13 rejects Plaintiff's challenges based on the ALJ's reasoning  
14 concerning the lay evidence.

15 X. The ALJ's Reasoning concerning Dr. Kester's Opinion

16 The ALJ referred to Dr. Kester's opinion somewhat obliquely  
17 in the course of addressing the medical opinion evidence. The ALJ  
18 qualified and expressly gave significant weight to the opinions  
19 of the treating psychiatrist and psychologist, Drs. Trivisonno  
20 and Birdlebough, as qualified. (A.R. 25.) The ALJ concluded that  
21 the import of the qualified opinions was that Plaintiff either  
22 never had a serious functional limitation, or had such a  
23 limitation for only a very limited time period. (A.R. 25.) The  
24 ALJ then stated:

25 The state agency medical consultant opinion was reasonable  
26 based on the available evidence at the time of the  
27 opinion and is thus given limited weight based on the  
28 medical evidence produced and received thereafter.

(A.R. 25.)



1           The Court notes that the ALJ had previously set forth the  
2 medical evidence in substantial detail and had recounted  
3 significant medical history, including that which arguably  
4 postdated Dr. Kester's opinion, including Plaintiff's marked  
5 improvement in all areas since starting on medication,  
6 Plaintiff's improving GAF assessments, Dr. Trivisonno's modified  
7 diagnosis, and Plaintiff's reports in April 2005 of being less  
8 depressed and having no manic, delusional, hallucinatory, or  
9 psychotic symptoms. (A.R. 18-20.) Thus, the ALJ in effect had  
10 noted that Plaintiff's symptoms had only improved after Dr.  
11 Kester rendered his opinion.

12           The Court further notes that in formulating Plaintiff's RFC,  
13 the ALJ's RFC closely tracked Dr. Kester's opinion of mild  
14 restriction in activities of daily living (A.R. 21, 318),  
15 moderate difficulties in social functioning that might cause  
16 difficulties with her ability to work closely with others (A.R.  
17 21, 306), and moderate difficulties in concentration,  
18 persistence, or pace but an ability to perform uncomplicated  
19 tasks (A.R. 21, 318, 305-06). He also concluded that Plaintiff's  
20 depressive disorder would cause some problems in working closely  
21 with others and in performing more than simple, uncomplicated  
22 tasks on a regular basis. (A.R. 25, 305.)

23           Plaintiff argues that the ALJ rejected the limitations  
24 identified by Dr. Kester but failed to explain the weight given  
25 to Dr. Kester's opinion. However, as noted above, the ALJ largely  
26 adopted Dr. Kester's opinion and expressly gave it weight, but  
27 considered it qualified by the later medical evidence, which  
28 reflected improved symptoms. The ALJ articulated a specific,

1 legitimate reason for giving the opinion limited weight, namely,  
2 its reasonableness based on the other, contemporaneous medical  
3 evidence. Further, contrary to Plaintiff's assertion, the ALJ did  
4 point out inconsistencies between Dr. Kester's assessment and the  
5 later evidence, which reflected milder symptoms and signs.

6 The Court concludes that the ALJ's reasoning concerning Dr.  
7 Kester's opinion was adequately set forth.

8 XI. Vocational Evidence at Step Five

9 Plaintiff argues that the hypothetical to the VE omitted  
10 limitations that Dr. Kester had assessed with respect to  
11 concentration, persistence, and pace. The VE testified that there  
12 were jobs for one who could perform at least medium exertional  
13 work; understand, remember, and carry out simple, routine tasks;  
14 and should have only superficial interaction with the public and  
15 coworkers and probably be limited to working with only a few  
16 coworkers while working relatively independently, not  
17 cooperatively, with others. (A.R. 365-66.) However, when  
18 Plaintiff's counsel restated the limitations to include a  
19 "significant interference" with the ability to maintain attention  
20 and concentration for extended periods, carry out detailed  
21 instructions, work in coordination with or proximity to others  
22 without being distracted, and interact appropriately with the  
23 general public, the expert testified that such a person could not  
24 maintain competitive employment. (A.R. 367-68.) These  
25 "significant" limitations posited by Plaintiff's counsel were  
26 apparently based on Dr. Kester's assessments that Plaintiff was  
27 "Moderately Limited" in this regard. (A.R. 305-07.) Dr. Kester  
28 had marked "Moderately Limited," and the other choices of ratable

1 limitations were "Not Significantly Limited," and "Markedly  
2 Limited." (A.R. 305-06, 368.) It thus appears that there were  
3 multiple categories of limitations that were beyond  
4 insignificant, but no category expressly labeled "Significant."

5       The VE testified that for one with the overall limitations  
6 endorsed by Dr. Kester, there were jobs. Contrary to the  
7 characterization of the opinion evidence set forth by Plaintiff's  
8 counsel, Dr. Kester expressly qualified the checks in the boxes  
9 by specifying further information in the section designed for  
10 elaborations on the capacities after the summary conclusions had  
11 been completed. (A.R. 307.) Dr. Kester stated that Plaintiff had  
12 only "somewhat limited concentration" but had the ability to  
13 perform simple, routine tasks routinely, and the ability to  
14 persist daily and weekly. (A.R. 307.) He concluded that she might  
15 be distracted until further stabilized on medication; she was not  
16 precluded from working with others but rather would "work best"  
17 with a limited number of coworkers performing relatively  
18 independent tasks. (A.R. 307.) Any limitations were only  
19 "moderate" at most. (A.R. 305-07.)

20       The Court notes that it has been held that a hypothetical  
21 question concerning an expert's limitation to simple, routine or  
22 repetitive tasks sufficiently captures even a moderate limitation  
23 of concentration, persistence, or pace noted by the expert who  
24 has opined that the claimant retains the ability to perform  
25 simple, routine or repetitive tasks. Stubbs-Danielson v. Astrue,  
26 539 F.3d 1169, 1173-75 (9<sup>th</sup> Cir. 2008).

27       Further, to the extent that medical evidence is  
28 inconsistent, conflicting, or ambiguous, it is the responsibility

1 of the ALJ to resolve any conflicts and ambiguity. Morgan v.  
2 Commissioner, 169 F.3d 595, 603 (9<sup>th</sup> Cir. 1999). Because the ALJ  
3 has authority to interpret ambiguous medical opinions, Matthews  
4 v. Shalala, 10 F.3d 678, 680 (9<sup>th</sup> Cir. 1993), the Court must  
5 defer to the ALJ's decision.

6 Here, the ALJ appropriately interpreted the totality of Dr.  
7 Kester's opinion. The ALJ's hypothetical question included  
8 accurate statements of the limitations found by Dr. Kester and  
9 accepted by the ALJ. The Court concludes that the ALJ  
10 appropriately interpreted and weighed the medical evidence and  
11 concluded on the basis of substantial evidence that for one with  
12 Plaintiff's RFC and other attributes, sufficient jobs existed.

13 XII. Disposition

14 Based on the foregoing, the Court concludes that the ALJ's  
15 decision was supported by substantial evidence in the record as a  
16 whole and was based on the application of correct legal  
17 standards.

18 Accordingly, the Court AFFIRMS the administrative decision  
19 of the Defendant Commissioner of Social Security and DENIES  
20 Plaintiff's Social Security complaint.

21 The Clerk of the Court IS DIRECTED to enter judgment for  
22 Defendant Michael J. Astrue, Commissioner of Social Security,  
23 and against Plaintiff Alisa A. Martinez.

24 IT IS SO ORDERED.

25 **Dated: February 19, 2010**

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE

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