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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ARTHUR SCHIEL,  
Plaintiff,

NO. 2:09-cv-1416 FCD EFB

v.

MEMORANDUM AND ORDER

MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,  
Defendant.

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This matter is before the court on defendant Michael J. Astrue's motion to alter or amend the judgment entered on October 1, 2010, pursuant to Federal Rule of Civil Procedure 59(e). Plaintiff opposes the motion. For the reasons set forth below,<sup>1</sup> defendant's motion to alter or amend judgment is GRANTED.

**BACKGROUND**

The court adopts the factual and procedural background set forth by the magistrate judge in his findings and

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<sup>1</sup> Because oral argument will not be of material assistance, the court orders these matters submitted on the briefs. E.D. Cal. L.R. 230(g).

1 recommendations. (See Finding & Recommendations ("F&R"), filed  
2 Aug. 16, 2010, at 1-6.)

3 **ANALYSIS**

4 Defendant moves to alter or amend the court's October 1,  
5 2010 judgment on the basis of the Ninth Circuit's decision in  
6 Lockwood v. Commissioner Social Security Administration, 616 F.3d  
7 1068 (9th Cir. 2010). Plaintiff opposes the motion, asserting  
8 that the Ninth Circuit's decision in Lockwood does not apply to  
9 this case.<sup>2</sup>

10 Where the court's ruling has resulted in a final judgment or  
11 order, a motion for reconsideration may be based either on Rule  
12 59(e) (motion to alter or amend judgment) or Rule 60(b) (motion  
13 for relief from judgment) of the Federal Rules of Civil  
14 Procedure. See School Dist. No. 1J, Multnomah County v. ACandS,  
15 Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). A motion for  
16 reconsideration is treated as a motion to alter or amend judgment  
17 under Federal Rule of Civil Procedure 59(e) if it is filed within  
18 twenty-eight days of entry of judgement. See American Ironworks  
19 & Erectors, Inc. v. N. Am. Constr. Corp., 248 F.3d 892, 899 (9th  
20 Cir. 2001).

21 "A district court has considerable discretion when  
22 considering a motion to amend a judgment under Rule 59(e)."  
23 Turner v. Burlington N. Santa Fe. R.R Co., 338 F.3d 1058, 1063  
24 (9th Cir. 2003) (citing McDowell v. Calderon, 197 F.3d 1253, 1254  
25 n.1 (9th Cir. 1999)). A motion to amend judgment may be granted

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26 <sup>2</sup> Plaintiff also asserts that the Ninth Circuit's  
27 decision in Lockwood is not final due to a pending petition for  
28 rehearing. On December 6, 2010, the petition for panel rehearing  
and rehearing en banc was denied.

1 where: (1) the court is presented with newly-discovered evidence;  
2 (2) the court committed "clear error or the initial decision was  
3 manifestly unjust"; or (3) there is an intervening change in the  
4 controlling law. School Dist. No. 1J, Multnomah County, 5 F.3d  
5 at 1263; Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th  
6 Cir. 2001).

7 In Lockwood, the Ninth Circuit addressed "whether an  
8 administrative law judge ("ALJ") erred when she failed to explain  
9 in her written decision why she treated a social security  
10 disability benefits claimant as being a person closely  
11 approaching advanced age instead of treating the claimant as  
12 being a person of advanced age." 616 F.3d at 1069. The court  
13 noted that by regulation, an ALJ is required to *consider* whether  
14 use an older age category in a borderline situation. Id. at  
15 1070. The court also noted that the ALJ had satisfied this  
16 requirement by acknowledging that the claimant was closely  
17 approaching advanced age, citing the relevant regulation  
18 regarding appropriate evaluation of which age category to apply,  
19 and evaluating the overall impact of all the factors in the  
20 claimant's case by relying on the testimony of a vocational  
21 expert. Id. at 1071-72. The Lockwood court concluded that such  
22 consideration was sufficient and that there was no "obligation to  
23 make express findings incorporated in the ALJ's opinion." Id. at  
24 1073.

25 The Ninth Circuit's decision in Lockwood is an intervening  
26 change in the law that warrants reconsideration of the court's  
27 order adopting the magistrate judge's findings and  
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1 recommendations.<sup>3</sup> In this case, the magistrate judge recommended  
2 that plaintiff's motion for summary judgment be granted in part  
3 and denied in part and that the case be remanded to the  
4 Commissioner of Social Security on the basis that the ALJ failed  
5 to provide in his written opinion the reasons for his conclusion  
6 that the older age category did not apply. (F&R at 10.)  
7 However, Lockwood holds that such a written explanation is not  
8 required. As in Lockwood, the ALJ in this case acknowledged that  
9 plaintiff was closely approaching advanced age. As in Lockwood,  
10 the ALJ in this case also cited 20 C.F.R. § 404.1563, which  
11 provides that an ALJ cannot apply age categories mechanically in  
12 a borderline situation. Finally, as in Lockwood, the ALJ  
13 evaluated the overall impact of all the factors in plaintiff's  
14 case by relying on the testimony of a vocational expert before  
15 finding that plaintiff was not disabled. Accordingly, as in  
16 Lockwood, the record reflects that the ALJ *considered* whether to  
17 use the older age category.<sup>4</sup> Therefore, there is no basis to  
18 remand the action to the Commissioner for further proceedings.

#### 19 CONCLUSION

20 For the foregoing reasons, defendant's Rule 59(e) motion to  
21 alter or amend judgment is GRANTED. In light of the Ninth  
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23 <sup>3</sup> The court concludes that the Ninth Circuit's decision  
24 is intervening as it was filed on August 16, 2010, the same date  
25 that the magistrate judge issued the findings and  
recommendations.

26 <sup>4</sup> The court also notes that to the extent the Ninth  
27 Circuit has concluded that these references demonstrate  
28 appropriate consideration of whether to use the older age  
category, these references are also sufficient to provide "a  
sufficient basis for review" as required by its remand order in  
this case.

1 Circuit's decision in Lockwood, plaintiff's motion for summary  
2 judgment and/or remand is DENIED, and defendant's cross-motion  
3 for summary judgment is GRANTED. The Clerk of Court is directed  
4 to close this case.

5 IT IS SO ORDERED.

6 DATED: December 8, 2010



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8 FRANK C. DAMRELL, JR.  
9 UNITED STATES DISTRICT JUDGE  
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