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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LINDA M. CETERA,)
)
 Plaintiff,)
 v.)
 MICHAEL J. ASTRUE,)
 COMMISSIONER OF SOCIAL)
 SECURITY,)
 Defendant.)
 _____)

Case No.: C-09-00734 PSG
**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT**
(Docket Nos. 22, 29)

Plaintiff Linda M. Cetera ("Cetera") filed this action on February 18, 2009, appealing the decision by Michael J. Astrue, Commissioner of Social Security ("Commissioner"), denying her disability insurance benefits.¹ Cetera moves for summary judgment. The Commissioner opposes the motion and cross-moves for summary judgment. Cetera did not file any reply to the Commissioner's cross-motion. The matter thereafter was submitted without oral argument, pursuant to Civ. L.R. 7-1(b). Having reviewed the papers and considered the arguments of counsel, Cetera's motion for summary judgment is DENIED and the Commissioner's cross-

¹ The challenged decision was rendered by Administrative Law Judge Brenton L. Rogozen ("the ALJ) on February 27, 2008. The ALJ's decision became final on December 22, 2008, when the Appeals Council of the Social Security Administration denied Cetera's request for administrative review of the decision.

1 motion for summary judgment is GRANTED.

2 **I. BACKGROUND**

3 The following facts are taken from the February 27, 2008 decision by the ALJ and the
4 accompanying administrative record (“AR”). At the time of the hearing, Cetera was fifty-three
5 years old.² She had a high school education and completed one year of college.³ Her past work
6 experience included five years conducting intake interviews for a school district and two years as
7 a concierge in the hotel industry.⁴ In December 2002, Cetera had a nervous breakdown that
8 caused her employment at the hotel to end.⁵ In 2004, Cetera sought permanent employment with
9 another hotel, a catering company and an Internet company.⁶ In each of those instances,
10 however, she was employed for less than 90 days because she was unable to “focus and was
11 slow to catch on.”⁷ Cetera described experiencing frequent panic attacks and anxiety.⁸ In
12 August 2007, Cetera was employed for less than a week with the San Jose Unified School
13 District.⁹ Her duties included speaking with parents and their children to determine placement
14 options for prospective students.¹⁰ One day, Cetera left work early because she was not feeling
15 well.¹¹ She rushed to the emergency room and was diagnosed with an anxiety disorder.¹² The
16 next day, Cetera was informed that her employment had been temporary and that she was no
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18 ² See AR at 43.

19 ³ See *id.* at 43-44.

20 ⁴ See *id.*

21 ⁵ See *id.* at 45.

22 ⁶ See *id.*

23 ⁷ See *id.*

24 ⁸ See *id.* at 51.

25 ⁹ See *id.*

26 ¹⁰ See *id.* at 52.

27 ¹¹ See AR at 53.

28 ¹² See *id.*

1 longer needed.¹³

2 Cetera alleges that she became disabled on August 11, 2003 as a result of depression and
3 exhaustion.

4 On October 5, 2005, Cetera applied for disability insurance benefits.¹⁴ The application
5 was initially denied on December 23, 2005.¹⁵ On October 20, 2006, her application was denied
6 upon reconsideration.¹⁶ The ALJ held an administrative hearing on February 5, 2008 in San
7 Jose, California.¹⁷ Cetera, who was represented by an attorney testified at the hearing.¹⁸ A
8 vocational expert, Thomas Linvill, also testified at the hearing.¹⁹

9 The ALJ found that Cetera was not disabled within the meaning of the Social Security
10 Act. The ALJ evaluated Cetera's condition pursuant to the sequential process required by 20
11 CFR §§ 404-1520(a) and 416.920(a). At step one, the ALJ concluded that Cetera had not
12 engaged in substantial gainful activity since August 11, 2003, the alleged onset date. At step
13 two, the ALJ found that Cetera's borderline intellectual functioning, depressive disorder (not
14 otherwise specified, in partial remission), generalized anxiety disorder (in partial remission), and
15 a personality disorder (not otherwise specified, with histrionic and passive-aggressive features)
16 constituted a severe combination of impairments under 20 CFR § 404.1520(c). The ALJ further
17 found that Cetera suffered a marked impairment of her short-term auditory memory. At step
18 three, the ALJ concluded that Cetera did not have an impairment or combination of impairments
19 that met or medically equaled one of the impairments in 20 CFR Part 404, Subpart P, Appendix
20 1.

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22 ¹³ See *id.* at 53-54.

23 ¹⁴ See Decision at 16.

24 ¹⁵ See *id.*

25 ¹⁶ See *id.*

26 ¹⁷ See *id.*

27 ¹⁸ See *id.*

28 ¹⁹ See AR at 24.

1 In determining Cetera's residual functional capacity, the ALJ found that while she was
2 moderately restricted in her ability to understand, remember, and carry out complex or detailed
3 tasks, she was not significantly limited in her ability to understand, remember and carry out the
4 simple and repetitive 1-2 step tasks characteristic of unskilled work.

5 At step four, the ALJ found that Cetera could not return to her past work. At step five,
6 the ALJ found that Cetera's residual functional capacity enabled her to perform other work that
7 exists in significant numbers in the national economy.

8 Based on those determinations, the ALJ concluded that Cetera was not disabled as
9 defined by the Social Security Act at any time through the date of his decision.

10 II. LEGAL STANDARD

11 A. Standard for Reviewing the Commissioner's Decision

12 Pursuant to 42 U.S.C. § 405(g), this Court has the authority to review the
13 Commissioner's decision denying Plaintiff benefits. The Commissioner's decision (here the
14 decision of the ALJ) will be disturbed only if it is not supported by substantial evidence or if it is
15 based upon the application of improper legal standards.²⁰ In this context, the term "substantial
16 evidence means "more than a mere scintilla but less than a preponderance-it is such relevant
17 evidence that a reasonable mind might accept as adequate to support the conclusion."²¹ When
18 determining whether substantial evidence exists to support the ALJ's decision, the court
19 examines the administrative record as a whole, considering adverse as well as supporting
20 evidence.²² Where evidence exists to support more than one rational interpretation, the court
21 must defer to the decision of the ALJ.²³

22 B. Standard for Determining Disability

23 A person is "disabled" for purposes of receiving disability insurance benefits if he or she
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25 ²⁰ See *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*, 966 F.2d
26 1255, 1257 (9th Cir. 1992).

27 ²¹ See *Moncada*, 60 F.3d at 523; *Drouin*, 966 F.2d at 1257.

28 ²² See *Drouin*, 966 F.2d at 1257; *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989).

²³ See *Moncada*, 60 F.3d at 523; *Drouin*, 966 F.2d at 1258.

1 is unable to engage in any substantial gainful activity due to a physical or mental impairment that
2 is expected to result in death or that has lasted or is expected to last for a continuous period of at
3 least twelve months.²⁴

4 Disability claims are evaluated using a five-step, sequential evaluation process. In the
5 first step, the Commissioner must determine whether the claimant currently is engaged in
6 substantial gainful activity; if so, the claimant is not disabled and the claim is denied.²⁵ If the
7 claimant is not currently engaged in substantial gainful activity, the second step requires the
8 Commissioner to determine whether the claimant has a “severe” impairment or combination of
9 impairments that significantly limits the claimant’s ability to do basic work activities; if not, a
10 finding of “not disabled” is made and the claim is denied.²⁶ If the claimant has a “severe”
11 impairment or combination of impairments, the third step requires the Commissioner to
12 determine whether the impairment or combination of impairments meets or equals an impairment
13 in the Listing; if so, disability is conclusively presumed and benefits are awarded.²⁷ If the
14 claimant’s impairment or combination of impairments does not meet or equal an impairment in
15 the Listing, the fourth step requires the Commissioner to determine whether the claimant has
16 sufficient “residual functional capacity”²⁸ to perform his or her past work; if so, the claimant is
17 not disabled and the claim is denied.²⁹ The plaintiff has the burden of proving that he or she is
18 unable to perform past relevant work.³⁰ If the claimant meets this burden, a *prima facie* case of
19 disability is established. The Commissioner then bears the burden of establishing that the
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21 ²⁴ See *Drouin*, 966 F.2d at 1257; *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984).

22 ²⁵ See *id.*

23 ²⁶ See *id.*

24 ²⁷ See *id.*

25 ²⁸ A claimant’s residual functional capacity (“RFC”) is what he or she can still do despite
26 existing exertional and nonexertional limitations. See *Cooper v. Sullivan*, 880 F.2d 1152, 1155
27 n.5 (9th Cir. 1989).

28 ²⁹ See *Drouin*, 966 F.2d at 1257; *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984).

³⁰ See *id.*

1 claimant can perform other substantial gainful work;³¹ the determination of this issue comprises
2 the fifth and final step in the sequential analysis.³²

3 III. DISCUSSION

4 Cetera requests that the court reverse the ALJ's final decision and remand the case to the
5 Social Security Administration for an award of benefits. Alternatively, Cetera requests that this
6 case be remanded for further administrative proceedings to determine whether she is disabled.
7 The Commissioner in turn asks that the ALJ's final decision be affirmed.

8 The specific issues raised in this case are whether the ALJ properly: (1) found that Cetera
9 could perform other work existing in the national economy; (2) articulated specific and
10 legitimate reasons for rejecting the opinion of Cetera's treating physicians; and (3) provided
11 specific and legitimate reasons for discounting Cetera's subjective complaints.

12 A. The ALJ Did Not Err in Finding that Cetera Could Perform Other Work in the 13 Economy

14 Cetera disputes whether substantial evidence supports the ALJ's finding that she could
15 perform other work existing in the national economy. Specifically, Cetera disputes the adequacy
16 of the hypothetical questions that were posed to the vocational expert during the hearing. Cetera
17 contends that neither her attorney nor the ALJ included in the hypothetical questions posed to the
18 vocational expert any reference to her age, education, work experience and non-exertional
19 limitations, including restrictions on her performing work involving contact with the general
20 public or any requirements that she have any extensive communication with supervisors and co-
21 workers. Cetera further contends that although the vocational expert identified five occupations
22 for her, he did not provide the number of jobs existing in the national economy. Instead, the ALJ
23 himself later sought to reconcile the vocational expert's testimony with title numbers contained
24 in the Dictionary of Occupational Titles. Cetera contends that this was improper.

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26 ³¹ As discussed further below, there are two ways for the Commissioner to meet the burden
27 of showing that there is other work in significant numbers in the national economy that claimant
can do: (1) by the testimony of a vocational expert or (2) by reference to the Medical-Vocational
Guidelines. *See Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999).

28 ³² *See* 20 C.F.R. §§ 404.1520, 416.920; *Lester v. Chater*, 81 F.3d 821, 828 n. 5 (9th Cir.
1995), *as amended* April 9, 1996; *Drouin*, 966 F.2d at 1257.

1 The Commissioner states that, notwithstanding any purported deficiencies in the
2 vocational expert’s testimony, the Medical-Vocational Guidelines (GRIDS) nevertheless offer
3 substantial evidence supporting the finding of not disabled. The Commissioner argues that
4 Cetera is able to do more than the full range of unskilled work at the light, medium, heavy and
5 very heavy exertional levels. While the Commissioner acknowledges that Cetera is moderately
6 limited in understanding, remembering, and carrying out complex, or detailed tasks, he argues
7 that interacting with the public is not a basic work activity. As a result, the Commissioner
8 maintains that the GRIDS may be used to support the finding of not disabled.

9 At step five, the burden of proof shifts to the agency to demonstrate that the claimant can
10 perform a significant number of other jobs in the national economy.³³ “This step-five
11 determination is made on the basis of four factors: the claimant’s residual functional capacity,
12 age, work experience and education.”³⁴ The Social Security Administration established the
13 GRIDS to assist in the step-five determination.³⁵ The GRIDS is a matrix of the four factors
14 described above and specific rules that identify whether jobs requiring a specific combination of
15 those factors exist in significant numbers in the national economy.³⁶ If the GRIDS match
16 claimant’s qualifications, the guidelines show whether jobs exist that claimant could perform.³⁷
17 On the other hand, if the GRIDS do not match claimant’s qualification, the ALJ can either (1)
18 use the GRIDS as a framework and determine what work exists that claimant can perform or (2)
19 rely on a vocational expert if the claimant has significant non-exertional limitations.³⁸

20 “The ALJ can use the grids without vocational expert testimony when a non-exertional
21 limitation is alleged because the grids ‘provide for the evaluation of claimants asserting both
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23 ³³ See *Hoopai v. Astrue*, 499 F.3d 1071, 1074 (9th Cir. 2007).

24 ³⁴ See *id.* at 1075.

25 ³⁵ See *id.*

26 ³⁶ See *id.*

27 ³⁷ See *id.*

28 ³⁸ See *id.*

1 exertional and non-exertional limitations.”³⁹ “The step two and step five determinations require
2 different levels of severity of limitations such that the satisfaction of the requirements at step two
3 does not automatically lead to the conclusion that the claimant has satisfied the requirements at
4 step five.”⁴⁰ At step five, “a vocational expert is required only when there are significant and
5 ‘sufficiently severe’ non-exertional limitations not accounted for in the grid.”⁴¹

6 Here, whatever the deficiencies in the vocational expert’s testimony, the court finds
7 substantial evidence in the record to affirm that Cetera did not suffer from significant and
8 sufficiently severe non-exertional limitations. First, between August 1, 2003 and September 18,
9 2005, Cetera’s treating physician Dr. Hector Cerezo indicated that Cetera was functioning well
10 and only experienced more severe symptoms during brief exacerbations of her impairments.⁴²
11 Dr. Cerezo’s notes further reflect that Cetera was reporting good relief from prescribed
12 medications and was consistently working or looking for work.⁴³

13 Second, from August 1, 2005 to September 28, 2005, Dr. Anthony Cozzolino treated
14 Cetera and diagnosed her with bipolar II disorder (ruling out major depression); cyclothymia (a
15 panic disorder without agoraphobia; and alcohol dependence (in sustained remission).⁴⁴ His
16 notes reflect that Cetera gave no description of clear manic symptoms and upon questioning, she
17 denied the presence of true panic attacks.⁴⁵ Dr. Cozzolini determined that her symptoms and
18 limitations were moderate.⁴⁶

19 Third, beginning in August 2005, Cetera also received treatment from Dr. Zorica
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21 ³⁹ *See id.* (citation omitted).

22 ⁴⁰ *See id.* at 1075.

23 ⁴¹ *See id.*

24 ⁴² *See AR* at 28.

25 ⁴³ *See id.*

26 ⁴⁴ *See AR* at 24.

27 ⁴⁵ *See id.*

28 ⁴⁶ *See id.*

1 Lialjevic.⁴⁷ Dr. Lialjevic diagnosed Cetera with recurrent depression of moderate severity.⁴⁸

2 In *Hoopai v. Astrue*, the Ninth Circuit explained that “moderate depression” has not been
3 held to a sufficiently severe non-exertional limitation that sufficiently limits a claimant’s ability
4 to do work beyond the exertional limitation.⁴⁹ As a result, whatever conflicting evidence was
5 presented, the court finds that “more than a mere scintilla” of evidence supports the ALJ’s
6 conclusion that Cetera’s depression was not a significant and sufficiently severe non-exertional
7 limitation that prohibited the ALJ’s reliance on the GRIDS.⁵⁰

8 **B. The ALJ Did Not Err in Rejecting the Opinion of Dr. Cerezo But Did Err in**
9 **Rejecting the Opinion of Dr. Rowland**

10 Cetera argues that the ALJ was not justified in discounting the opinions of her treating
11 physicians, Drs. Cerezo and Rowland. The Commissioner contends that the ALJ reasonably
12 concluded that the opinions of Drs. Cerezo and Rowland were based on Cetera’s subjective
13 complaints and were contradicted and outweighed by the better-supported medical opinions of
14 Dr. Roxanne Morse and state agency medical consultants.

15 If a treating or examining doctor’s opinion is contradicted by another doctor’s opinion, an
16 ALJ may reject it only by providing specific and legitimate reasons that are supported by
17 substantial evidence.⁵¹

18 Here, the ALJ discounted the opinion of Dr. Cerezo because it was not based on a current
19 treating relationship with Cetera and his treatment of her had been administered more than two-
20 and-one-half years prior to the date of his opinion.⁵² His initial intake examination occurred on
21 July 30, 2003 and his treatment notes cover a period from August 1, 2003 to September 28,

22 ⁴⁷ *See id.*

23 ⁴⁸ *See id.*

24 ⁴⁹ *See Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007).

25 ⁵⁰ *See id.* at 1077. To the extent the ALJ entertained testimony from the vocational expert,
26 any error in doing so was therefore harmless.

27 ⁵¹ *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (citing *Lester v. Chatar*, 81
28 F.3d at 830).

⁵² *See* AR at 13.

1 2005.⁵³ However, he did not treat or examine Cetera for the next two and one-half years.⁵⁴ On
2 January 25, 2008, Dr. Cerezo opined that Cetera had a marked restriction of her ability to
3 perform a number of basic work activities as a result of poor concentration, mood swings,
4 anxiety, and poor memory secondary to her posttraumatic stress disorder and bipolar I disorder.⁵⁵
5 He concluded that the earliest onset was July 19, 2005.⁵⁶ The ALJ concluded that he could not
6 accord significant weight to Dr. Cerezo's opinion because he had not examined Cetera after July
7 2005 and before the date of his decision. Moreover, to the extent that Dr. Cerezo's treatment
8 notes reflect that Cetera functioned well during the course of his treatment between July 2003
9 and July 2005 and that she only experienced more severe exacerbations of her impairments, the
10 ALJ did accord significant weight to Dr. Cerezo's opinion. Based on the above, the court finds
11 that the ALJ provided specific and legitimate reasons supported by substantial evidence to limit
12 the weight he accorded to Dr. Cerezo's opinion outside of the dates he provided treatment to
13 Cetera.

14 For his part, Dr. Rowland began treating Cetera on January 25, 2007.⁵⁷ He opined that
15 Cetera had marked restriction of her ability to work in coordination with or proximity to others
16 without being unduly distracted; of her ability to accept instructions and respond appropriately to
17 criticism from supervisors; or her ability to interact properly with the general public; of her
18 ability to maintain appropriate behavior and adhere to basic standards of cleanliness; and of her
19 ability to set realistic goals and make plans independently of others.⁵⁸ He further opined that
20 Cetera experienced anhedonia or pervasive loss of interest in almost all activities, psychomotor
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23 ⁵³ See AR at 12.

24 ⁵⁴ See *id.*

25 ⁵⁵ See *id.*

26 ⁵⁶ See *id.*

27 ⁵⁷ See AR at 10.

28 ⁵⁸ See *id.*

1 agitation or retardation, difficulty concentrating or thinking, and suicidal ideation.⁵⁹ The ALJ
2 based his opinion substantially on Cetera's subjective statements, which the ALJ had found were
3 not entirely credible.⁶⁰ Additionally, the ALJ determined that Dr. Rowland's opinion contained
4 inconsistencies with his own treatment notes which reflect Cetera reporting that she experienced
5 no side effects from prescribed medications and was well-groomed, fully-alert and oriented.⁶¹
6 Finally, the ALJ noted that Cetera was able to sustain semiskilled work between 2004 and 2006,
7 which demonstrated a functional capability fundamentally inconsistent with complaints of
8 disabling symptoms.⁶²

9 The ALJ accorded less weight to Dr. Rowland's opinion because his opinion was
10 inconsistent with his own treatment notes which revealed Cetera consistently reported good
11 results from treatment and no side effects from prescribed medications.⁶³ The ALJ also observed
12 that while Cetera did exhibit a somewhat tangential thought process and labile effect during
13 examinations performed by Dr. Rowland, these minor clinical abnormalities were outweighed by
14 Cetera's acknowledgment to Dr. Rowland and examining physicians throughout the record that
15 she was able to perform all of her daily activities and was repeatedly capable of sustaining fairly
16 demanding unskilled work for periods up to 90 days.⁶⁴ The ALJ also noted Cetera's ability to
17 perform semiskilled work for several significant periods of time between 2004 and 2006
18 demonstrated a functional capacity that was fundamentally inconsistent with complaints of
19 disabling symptoms.⁶⁵

20 In light of the highly deferential standard mandated by the Ninth Circuit, the court must
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22 ⁵⁹ *See id.*

23 ⁶⁰ *See AR at 14.*

24 ⁶¹ *See AR at 29.*

25 ⁶² *See id.*

26 ⁶³ *See AR at 29, 296.*

27 ⁶⁴ *See AR at 29,128-133, 240, 296-300.*

28 ⁶⁵ *See AR at 296-300.*

1 conclude that these findings constitute substantial evidence to support the ALJ's rejection of Dr.
2 Rowland's statements.

3 **C. The ALJ Properly Evaluated Cetera's Subjective Complaints**

4 Cetera argues that the ALJ improperly discounted her testimony regarding her limitations
5 and pain. She claims that the actual record does not provide sufficient grounds for the ALJ's
6 adverse credibility determination. The Commissioner asserts that the ALJ provided numerous
7 clear and convincing reasons for rejecting Cetera's subjective complaints, including the
8 conservative nature of the treatment she received, her significant daily activities, and the
9 inconsistencies between Cetera's testimony and certain statements she made to her treating
10 physicians.⁶⁶

11 This court's review of the ALJ's decision regarding credibility determinations is
12 limited.⁶⁷ Undeniably, the ALJ's assessment of a claimant's credibility must be "properly
13 supported by the record" and "sufficiently specific" to assure the reviewing court that the ALJ
14 "rejected the testimony on permissible grounds and did not arbitrarily discredit a claimant's
15 testimony regarding pain."⁶⁸ Absent affirmative evidence of malingering, an ALJ may not
16 discount a claimant's testimony without clear and convincing reasons.⁶⁹ Nevertheless, the court
17 must give deference to the ALJ's assessment of Plaintiff's credibility if it is supported by the
18 record and applicable legal standards.⁷⁰

19 Here, the ALJ concluded that Cetera had received only conservative treatment from
20 mental health care physicians and that Cetera had engaged in significant daily activities,
21 including preparing food, watching television, working in the garden, doing housework, going to

22 ⁶⁶ See AR at 28.

23 ⁶⁷ See *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992) ("The trier of fact and not
24 the reviewing court must resolve conflicts in the evidence, and if the evidence can support either
25 outcome, the court may not substitute its judgment for that of the ALJ.").

26 ⁶⁸ See *Bunnell v. Sullivan*, 947 F.2d 341, 345-346 (9th Cir. 1995) (quoting *Elam v. Railroad
Retirement Bd.*, 921 F.2d 1210, 1213-1214 (11th Cir. 1991) (quotations omitted)).

27 ⁶⁹ See *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).

28 ⁷⁰ See *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (citing *Reddick v. Chafer*,
157 F.3d 715, 720 (9th Cir. 1998)).

1 appointments, taking care of pets, doing laundry, shopping for food and personal items, and
2 dining out with friends and family several times a month. The ALJ found Cetera's subjective
3 complaints "not entirely credible" because of inconsistencies between her hearing testimony and
4 statements she made to her doctors regarding the duration, severity, and limiting effect of her
5 symptoms.

6 In *Johnson v. Shalala*, the Ninth Circuit held that discrepancies between medical
7 evidence and a plaintiff's testimony may be considered in a credibility assessment.⁷¹ "If a
8 claimant is able to spend a substantial part of his day engaged in pursuits involving the
9 performance of physical functions that are transferable to a work setting, a specific finding as to
10 this fact may be sufficient to discredit a claimant's allegations."⁷²

11 Based on the above, the court finds that the ALJ has provided clear and convincing
12 reasons to reject Cetera's testimony. Affording the ALJ's credibility determination the
13 deference to which it is entitled, the court finds no error.

14 IV. CONCLUSION

15 For the foregoing reasons, Cetera's motion for summary judgment is DENIED and the
16 Commissioner's cross-motion for summary judgment is GRANTED.

17 IT IS SO ORDERED.

18 Dated: March 29, 2011



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20 _____
21 PAUL S. GREWAL
22 United States Magistrate Judge
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27 _____
28 ⁷¹ See *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995).

⁷² See *Morgan v. Comm'r of Soc. Sec.*, 169 F.3d 595, 600 (9th Cir. 1999).