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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 PAULINE HARRINGTON,  
12  
13 vs. Plaintiff,  
14 MICHAEL J. ASTRUE, Commissioner of  
Social Security,  
15 Defendant.

CASE NO. 07cv1330 JM(RBB)

ORDER GRANTING MOTION TO  
ALTER PRIOR JUDGMENT OR  
ORDER

16  
17 Defendant Michael J. Astrue, Commissioner of Social Security (“Commissioner”), moves  
18 pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend this court’s September 29, 2008  
19 Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment (“Order”).  
20 Specifically, the court found that the ALJ’s failure to ask the vocational expert (“VE”) if her testimony  
21 conflicted with the Dictionary of Occupational Titles (“DOT”) constituted reversible error under  
22 Massachi v. Astrue, 486 F.3d 1149 (9<sup>th</sup> Cir. 2007). The Commissioner argues that remand to the ALJ  
23 for further consideration is not warranted under the circumstances because such an error is harmless  
24 in light of the evidentiary record. Plaintiff opposes the motion.

25 **DISCUSSION**

26 A motion to alter or amend a judgment or order under Rule 59(e) or Rule 60 is appropriate  
27 where “(1) the district court is presented with newly discovered evidence, (2) the district court  
28 committed clear error or made an initial decision that was manifestly unjust, or (3) there is an

1 intervening change in controlling law.” Duarte v. Bardales, 526 F.3d 563, 567 (9<sup>th</sup> Cir. 2008); School  
2 Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9<sup>th</sup> Cir. 1993) (citations omitted), cert. denied, 114  
3 S. Ct. 2742 (1994). The Government argues that any error in the underlying administrative proceeding  
4 is harmless because “substantial evidence [] supports the ALJ’s conclusion that the VE’s testimony  
5 was consistent with the DOT (Dictionary of Occupational Titles).” (Motion at p. 2:15-16). For the  
6 reasons set forth below, the court finds this argument persuasive and therefore reconsiders its prior  
7 Order.

8         The court incorporates the analysis set forth in its earlier Order and addresses the issues raised  
9 by the Commissioner. “The procedural requirements of SSR 00-4 ensure that the record is clear as  
10 to why an ALJ relied on a vocational expert’s testimony, particularly in cases where the expert’s  
11 testimony conflicts with the” DOT. Massachi, 486 F.3d at 1152. Where there is an apparent conflict  
12 between the VE’s testimony and the DOT, “at a minimum” the ALJ “must inquire through a  
13 vocational expert into the possible inconsistency.” Burns v. Barnhart, 312 F.3d 113, 127 (3<sup>rd</sup> Cir.  
14 2002) (finding that Social Security Ruling 00-4p requires the ALJ to ask the vocational expert whether  
15 any possible conflicts exist between the vocational expert’s testimony and the DOT).

16         As the VE’s testimony was consistent with the DOT, the Commissioner concludes that there  
17 was no need for testimony explaining the inconsistencies as no material inconsistency exists.  
18 Consequently, the Commissioner concludes that the court committed clear error. As set forth in the  
19 Order, two of the positions identified by the VE (counter clerk and office helper) require a level two  
20 reasoning level. (Order at 18-21). A level two GED reasoning means the worker must apply  
21 “commonsense understanding to carry out detailed but uninvolved written or oral instructions and deal  
22 with problems involving a few concrete variables in or from standardized situations.” 1 U.S. Dept of  
23 Labor, DOT Titles Nos. 239.567-010, 249.366-010, at 210, 217 (4<sup>th</sup> ed. Rev. 1991). Reasoning at  
24 GED level one means the worker must apply “commonsense understanding to carry out simple one-or  
25 two-step instructions and deal with standardized situations with occasional or no variables in or from  
26 these situations encountered on the job.” Id., No. 230.687-101, at 205.


27         In addressing Plaintiff’s reasoning level (and as set forth in the Order), the ALJ determined  
28 that Plaintiff was able to perform “simple, repetitive work [and] to understand detailed but

1 uncomplicated instructions, and simple one/two instructions.” (Admin. R. 19; Order at p.19). While  
2 the ALJ’s findings do not precisely parrot the definition of GED level two in the DOT, the degree or  
3 level of reasoning identified by the ALJ is consistent with the definition of GED level two in the DOT.  
4 In this sense, there is no apparent conflict between the VE’s testimony and the DOT which would  
5 trigger the further consistency review contemplated in Massachi. As the scope of this court’s review  
6 of the Commissioner’s decision is limited to determine whether it is supported by substantial evidence  
7 and is free of legal error, Hermes v. Secretary, 926 F.2d 789, 790 (9th Cir. 1991), the court finds that  
8 it would be clear error to remand this matter for further determinations where the evidentiary record  
9 supports the Commissioner’s decision.

10 In sum, the court grants the motion to reconsider the prior Order. The Clerk of Court is  
11 instructed to enter judgment on the cross motions for summary judgment (Docket Nos. 18, 19), in  
12 favor of Defendant and against Plaintiff on all claims.

13 **IT IS SO ORDERED.**

14 DATED: January 13, 2009

  
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Hon. Jeffrey T. Miller  
United States District Judge

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17 cc: All parties  
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