

IN THE
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-1413

SUSAN R. JOHNSTON,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities	iv
Statement of the Issues Presented for Review	1
Statement of the Case	1
A. Nature of the Case.....	1
B. Statement of Relevant Facts and Course of Proceedings Below	1
Summary of Argument	6
Argument.....	7
I. THE BOARD ERRED BY PROVIDING AN INADEQUATE STATEMENT OF REASONS AND BASES FOR DENYING A RATING IN EXCESS OF 70 PERCENT FOR DEPRESSION AND AN EFFECTIVE DATE EARLIER THAN MARCH 17, 2014, FOR THE ASSIGNMENT OF A 30 PERCENT RATING FOR SINUSITIS.....	7
A. The BVA’s statement of reasons and bases for denying a rating in excess of 70 percent for depression is inadequate where it impermissibly introduced criteria outside the General Rating Formula for Mental Disorders, failed to adequately address the occupational and social impact of the veteran’s symptomatology, and did not adequately explain why the evidence of record does not demonstrate active suicidal intent and harm to others.....	8
B. The Board’s statement of reasons and bases for denying an effective date earlier than March 17, 2014, for the assignment of a 30 percent rating is inadequate, where the Board failed to discuss why an earlier effective date is not warranted in light of the May 2014 DBQ report showing that the veteran had more than seven non-incapacitating episodes of sinusitis over the past 12 months, or why the claim should not be remanded for further development.....	11
Conclusion	12

TABLE OF AUTHORITIES

Page

Cases

<i>Allday v. Brown</i> , 7 Vet.App. 517 (1995).....	7, 9, 10, 12
<i>Bankhead v. Shulkin</i> , 29 Vet.App. 10 (2017)	8, 9, 10
<i>Fenderson v. West</i> , 12 Vet.App. 119 (1999)	10
<i>Gabrielson v. Brown</i> , 7 Vet.App. 36 (1994)	7
<i>Littke v. Derwinski</i> , 1 Vet.App. 90 (1990)	12
<i>Massey v. Brown</i> , 7 Vet.App. 204 (1994)	8, 9
<i>Mauerhan v. Principi</i> , 16 Vet.App. 436 (2002)	8, 9
<i>Mittleider v. West</i> , 11 Vet.App. 181 (1998).....	7, 9, 10
<i>Pernorio v. Derwinski</i> , 2 Vet.App. 625 (2002)	8, 9
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009)	10, 12
<i>Tucker v. West</i> , 11 Vet.App. 369, 374 (1998)	8, 10, 12
<i>Vazquez-Claudio v. Shinseki</i> , 713 F.3d 112 (Fed. Cir. 2013).....	8, 9

Statutes

38 U.S.C. § 5110(b)(2)	11, 12
38 U.S.C. § 7104(d)(1).....	7, 9, 10, 12

Regulations

38 C.F.R. § 3.400(o)(2)	6, 8, 11, 12
38 C.F.R. § 4.130, General Rating Formula for Mental Disorders	9, 10

RBA Citations

R. at 3-29 (BVA Decision)	1, 5, 6, 9, 10, 11, 12
R. at 290-92 (Medical Record)	3
R. at 435-39 (Medical Record)	3
R. at 560-62 (Medical Record)	3, 10
R. at 852 (Medical Record)	3, 10
R. at 1058 (Medical Record)	4
R. at 1076 (Medical Record)	4
R. at 1077-80 (Medical Record)	4, 10
R. at 1081-85 (Medical Record)	4
R. at 1604-06 (Medical Record)	4
R. at 1646-48 (Medical Record)	4
R. at 1650-53 (Medical Record)	4
R. at 1796-00 (Medical Record)	5
R. at 2447-49 (VA Form 9)	5

R. at 2544-76 (Statement of the Case)	5
R. at 2637-39 (Notice of Disagreement).....	5
R. at 2660-65 (Rating Decision)	5
R. at 2700-05 (Medical Record).....	5, 11
R. at 2987-89 (Medical Record).....	4, 10
R. at 3352 (DD Form 214)	1
R. at 3362 (DD Form 214)	1
R. at 3364 (DD 214)	1
R. at 3367 (DD Form 214)	1
R. at 3394-95 (Application for Benefits).....	4
R. at 3396-00 (Rating Decision)	4
R. at 3412-19 (Rating Decision)	4
R. at 3486-87 (Medical Record).....	2
R. at 3945-46 (Medical Record).....	4
R. at 4139-44 (Rating Decision)	4
R. at 4159-70 (Rating Decision)	4
R. at 4214-17 (Medical Record).....	4
R. at 4501-05 (Application for Benefits).....	4
R. at 4518 (Veteran’s Statement)	3
R. at 4530-35 (Rating Decision Cover Letter)	3
R. at 4545-52 (Rating Decision)	3
R. at 5006 (Application for Benefits)	3
R. at 5323-35 (Rating Decision)	3
R. at 5406-16 (Medical Record).....	3
R. at 5794 (Application for Benefits)	2
R. at 5829-34 (Rating Decision)	2
R. at 5835-38 (Rating Decision Cover Letter)	2
R. at 5986-89 (Application for Benefits)	2, 3
R. at 6033-34 (Rating Decision Cover Letter)	2
R. at 6038-40 (Rating Decision)	2
R. at 6054 (Application for Benefits)	2
R. at 6064-66 (Rating Decision)	2
R. at 6072-77 (Rating Decision)	2
R. at 6095-98 (Application for Benefits).....	2
R. at 6099-6101 (Medical Record).....	2

CAVC Docket Entries

Case Number 19-1413, August 19, 2019, Docket Entry: Court Order.....	1
CAVC Case Number 19-1413, May 15, 2019, Docket Entry: Appellant’s Notice of Appellant’s Death and Copy of Death Certificate.....	1

CAVC Case Number 19-1413, May 15, 2019, Docket Entry: Mot of Appellant to substitute party.....	1
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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Board of Veterans' Appeals ("Board" or "BVA") erred by providing an inadequate statement of reasons and bases for (A) denying a rating in excess of 70 percent for depression, where it impermissibly introduced criteria outside the General Rating Formula for Mental Disorders, failed to adequately address the occupational and social impact of the veteran's symptomatology, and did not adequately explain why the evidence of record does not demonstrate active suicidal intent and harm to others, and (B) an effective date earlier than March 17, 2014, for the 30 percent rating for sinusitis, where the Board failed to discuss why an earlier effective date is not warranted in light of the May 2014 DBQ report showing that the veteran had more than seven non-incapacitating episodes of sinusitis over the past 12 months, or why the claim should not be remanded for further development.

STATEMENT OF THE CASE

A. Nature of the Case

The November 9, 2018, BVA decision denied, in pertinent part, a 100 percent rating for depression; and an effective date earlier than March 17, 2014, for the 30 percent rating for sinusitis. [Record Before the Agency ("R.") at 10-16, 25-27 (3-29)].

B. Statement of Relevant Facts and Course of Proceedings Below

Bruce Johnston served honorably in the Army from February 1, 1994, to June 17, 1994, from March 26, 1996, to June 18, 1996, and from June 17, 1997, to March 10, 2000. [R. at 3352, 3364, 3367]. Mr. Johnston passed away during the course of this appeal from a heart attack. See CAVC Case Number 19-1413, May 15, 2019, Docket Entry: Appellant's Notice of Appellant's Death and Copy of Death Certificate. His widow, Susan Johnston, was substituted as the Appellant. See CAVC Case Number 19-1413, May 15, 2019, Docket Entry: Mot of Appellant to substitute party; Case Number 19-1413,

August 19, 2019, Docket Entry: Court Order.

During service, the veteran developed persistent sinus problems, hypertension, bilateral knee pain, and left shoulder problems. [R. at 6099 (6099-6101)]. He underwent sinus surgery in 1999 for the removal of a cyst. [R. at 3486-87].

In March 2000, Mr. Johnston applied for service-connected benefits for a left shoulder condition, hypertension, a bilateral knee condition, and sinusitis, amongst others. [R. at 6095-98]. By a May 2000 rating decision, VA, in pertinent part, granted service connection for left knee osteochondritis, right knee patellofemoral pain syndrome and posterior cruciate ligament tear, left rotator cuff strain, hypertension, and sinusitis. [R. at 6064-66, 6073-77]. It assigned a non-compensable rating for the sinusitis. [R. at 6064 (6064-66)].

In July 2001, the veteran sought an increased rating for his sinusitis, amongst his other service-connected conditions. See [R. at 6054]. VA continued the non-compensable rating by an October 2001 rating decision. [R. at 6033-34, 6038-40]. The veteran filed a VA Form 21-8940, Application for Increased Compensation Based on Unemployability in November 2002. [R. at 5986-89]. VA issued a rating decision in September 2003 rating decision; it did not address the veteran's sinus condition. [R. at 5829-34, 5835-38].

Mr. Johnston applied for entitlement to service connection for post-traumatic stress disorder and anxiety in October 2003. [R. at 5794]. Medical records from 2003

show symptomatology of panic, agoraphobia, suicidal ideation, and mood swings. [R. at 435-39, 560-62, 825]. A January 2003 medical record states that the veteran almost killed his dog during a fit of anger. [R. at 560-62].

In June 2004, Mr. Johnston filed a VA Form 21-8940, Application for Increased Compensation Based on Unemployability. [R. at 5986-89]. A medical record from July 2004 states that his sinusitis caused daily nasal congestion, bloody, yellow discharge, and nausea. [R. at 290-92]. The veteran underwent a VA compensation and pension (“C&P”) examination in October 2004. [R. at 5406-16]. Mr. Johnston reported sinus pain, drainage, headaches, and epistaxis, and stated that he uses antibiotics to treat it. *Id.* at 5410.

By a February 2005 rating decision, VA denied service connection for post-traumatic stress disorder and a compensable rating for sinusitis, amongst other denials. [R. at 5323-35].

The veteran requested that VA re-open his claim for service connection for post-traumatic stress disorder and a compensable rating for sinusitis, amongst other claims, in February 2011. [R. at 5006]. VA continued the denial of service connection for post-traumatic stress disorder and a compensable rating for sinusitis by a December 2011 rating decision. [R. at 4530-35, 4545-52]. In February 2012, Mr. Johnston informed VA that the rating for his sinusitis condition should be higher, and that he would like VA to reconsider the denial of service-connected benefits for PTSD. [R. at 4518]. He filed a VA

Form 21-8940, Application for Increased Compensation Based on Unemployability, in April 2012. [R. at 4501-05].

Medical records from 2012 show that Mr. Johnston suffered from panic attacks, social isolation, and occasional paranoia and delusions. [R. at 1604-06, 1646-48, 1650-53, 3945-46]. The veteran underwent a VA mental disorders C&P examination in August 2013. [R. at 4214-17]. The VA examiner diagnosed depression, and stated that it is at least as likely as not due to the veteran's service-connected knee, shoulder, and hypertension conditions. *Id.* at 4215. Medical records generated after this examination in 2013 state that Mr. Johnston suffers from strained relationships and hallucinations, findings it difficult to get out of bed, and can only perform basic needs. [R. at 1058, 1076, 1077-80, 1081-85, 2989 (2987-89)].

By a September 4, 2013, rating decision, VA granted, amongst other claims, entitlement to service connection for depression, assigning a 50 percent rating, effective February 24, 2012. [R. at 4139-44, 4159-70]. It continued the 50 percent rating for depression by a February 2014 rating decision. [R. at 3396-3400, 3412-19]. VA did not adjudicate issue of the rating for the veteran's sinusitis in either decision.

In March 2014, Mr. Johnston filed a VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits, listing, in pertinent part, PTSD and sinusitis. [R. at 3394-95]. In May 2014, he underwent a disability benefits questionnaire ("DBQ") examination for sinus, rhinitis, and other conditions of the nose, throat, larynx,

and pharynx. [R. at 2700-05]. The examiner diagnosed the veteran with allergic rhinitis and episodic acute sinusitis, and stated that in the past 12 month the veteran had seven or more non-incapacitating episodes of sinusitis characterized by headaches, pain and purulent discharge or crusting. [R. at 2700, 2701 (2700-05)]. In June 2014, Mr. Johnston underwent a VA mental disorders C&P examination. [R. at 1796-1800]. The examiner noted symptomatology of depressed mood, anxiety, chronic sleep impairment, flattened affect, disturbances in motivation and mood, difficulty in adapting to stressful circumstances, and difficulty in establishing and maintaining effective work and social relationships. *Id.* at 1798.

By a June 2014 rating decision, VA, in pertinent part, assigned a 30 percent rating for the veteran's sinusitis, effective March 17, 2014; it continued the 50 percent rating for depression. [R. at 2660-65]. Mr. Johnston filed a timely Notice of Disagreement. [R. at 2637-39]. Following VA's issuance of the May 2016 Statement of the Case, the veteran filed a timely VA Form 9. [R. at 2447-49, 2544-76]. He argued for an earlier effective date for the assignment of the 30 percent rating for sinusitis, noting that the medical records reveal a worsening of the veteran's symptomatology prior to March 17, 2014. [R. at 2448 (2447-49)]. Mr. Johnston further argued for a rating in excess of 50 percent for depression. [R. at 2448-49 (2447-49)].

On November 9, 2018, the BVA issued the decision on appeal. [R. at 3-29]. In pertinent part, the Board denied a rating in excess of 70 percent for depression. *Id.* at 8-

16. The Board noted the veteran's hallucinations, but denied a rating in excess of 70 percent based on the veteran's ability to efficiently converse, generally manage his daily activities, lack of psychosis, and not being out of touch with reality. *Id.* at 15. The BVA further stated that his decision to stop taking medication constituted passive suicidal ideation, warranting a 70 percent rating. *Id.* at 13. The BVA also denied an effective date earlier than March 17, 2014, for the assignment of a 30 percent rating for sinusitis, stating that an earlier effective date could not be assigned under 38 C.F.R. § 3.400(o). *Id.* at 25-27. The veteran appealed.

SUMMARY OF THE ARGUMENT

The Board erred by providing an inadequate statement of reasons or bases for denying a rating in excess of 70 percent, where it impermissibly introduced criteria outside the General Rating Formula for Mental Disorders, failed to adequately address the occupational and social impact of the veteran's symptomatology, and did not adequately explain why the evidence of record does not demonstrate active suicidal intent and harm to others.

The Board also erred by providing an inadequate statement of reasons or bases for denying an effective date earlier than March 17, 2014, for the assignment of a 30 percent rating for sinusitis, where it failed to discuss why an earlier effective date is not warranted in light of the May 2014 DBQ report showing that the veteran had more than seven non-incapacitating episodes of sinusitis over the past 12 months, or why the claim

should not be remanded for further development.

ARGUMENT

I. THE BOARD ERRED BY PROVIDING AN INADEQUATE STATEMENT OF REASONS AND BASES FOR DENYING A RATING IN EXCESS OF 70 PERCENT FOR DEPRESSION AND AN EFFECTIVE DATE EARLIER THAN MARCH 17, 2014, FOR THE ASSIGNMENT OF A 30 PERCENT RATING FOR SINUSITIS.

In every decision it renders, the Board must articulate the reasons and bases for its findings and conclusions on all material issues of fact and law presented by the record. Such explanations should be sufficiently detailed to allow the claimant to understand the basis for the Board's decision and to facilitate judicial review. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Mittleider v. West*, 11 Vet.App. 181, 182 (1998) (explaining that the need for adequate reasons or bases is "particularly acute when BVA findings and conclusions pertain to the degree of disability resulting from mental disorders"). To comply with these requirements, the Board must analyze the credibility and probative value of the evidence, explain which evidence it finds to be persuasive or unpersuasive, and provide an explanation for the rejection of any material evidence that supports the claim. *See Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994).

When evaluating a psychiatric condition, the Board must assess the frequency, severity, and duration of the symptoms that cause occupational and social impairment, quantify the level of occupational and social impairment caused by those symptoms, and assign an evaluation that most closely approximates that level of occupational and

social impairment. *See Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013); *Mauerhan v. Principi*, 16 Vet.App. 436, 440 (2002); *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017). This Court has held that suicidal ideation may be either passive or active – both fall under the 70 percent criteria. *Bankhead, supra*. Actual suicidal intent falls under the 100 percent rating criteria. *Id.* When evaluating the rating to be assigned a condition, the Board’s statement of reasons or bases is inadequate where it considers factors outside the rating criteria provided by the regulations. *See Massey v. Brown*, 7 Vet.App. 204, 207 (1994); *Pernorio v. Derwinski*, 2 Vet.App. 625, 628 (2002); *Mauerhan*, 16 Vet.App. at 440.

When adjudicating an increased rating claim, VA may assign an effective date within one year of the claim when it is factually ascertainable that the disability increased in severity. *See* 38 C.F.R. § 3.400(o)(2).

Where the Board’s statement of reasons or bases is inadequate, the appropriate remedy is to vacate its decision and remand the matter. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

- A. The BVA’s statement of reasons and bases for denying a rating in excess of 70 percent for depression is inadequate where it impermissibly introduced criteria outside the General Rating Formula for Mental Disorders, failed to adequately address the occupational and social impact of the veteran’s symptomatology, and did not adequately explain why the evidence of record does not demonstrate active suicidal intent and harm to others.**

The Board denied a rating in excess of 70 percent, in part, based on the veteran’s

ability to efficiently converse, generally manage his daily activities, his lack of psychosis, and not being out of touch with reality. [R. at 15 (3-29)]. The ability to efficiently converse, lack of psychosis, and not being out of touch with reality are not among the factors contemplated by the 100 percent rating criteria. *See* 38 C.F.R. § 4.130, General Rating Formula for Mental Disorders. Furthermore, the BVA denied a rating in excess of 70 percent because the veteran is “generally manage his daily activities.” [R. at 15 (3-29)]. VA, however, must evaluate a veteran’s psychiatric condition based on the level of occupational and social impairment caused by their symptoms, not the level of impairment to the management of daily activities. *See* 38 C.F.R. § 4.130; *Vazquez-Claudio*, 713 F.3d at 118; *Mauerhan*, 16 Vet.App. at 440; *Bankhead*, 29 Vet.App. at 22. The evaluation of the veteran’s depression based on these un-listed criteria constitutes error. *See Massey*, 7 Vet.App. at 207; *Pernorio*, 2 Vet.App. at 628; *Mauerhan*, 16 Vet.App. at 440. While the use of the term “such symptoms as” in 38 C.F.R. § 4.130, General Rating Formula for Mental Disorders, indicates that the list of symptoms that follows is not exhaustive, the Board provided no explanation for its selection of non-listed symptoms as a basis for evaluating the veteran. The absence of a statement of reasons or bases for selecting these criteria frustrates judicial review of the Board’s denial of a 100 percent rating, and hinders understanding of the BVA’s decision. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Mittleider*, 11 Vet.App. at 182.

The Board noted that Mr. Johnston had “passive suicidal ideation, where he

stopped taking his medications for a slow death,” and that the veteran nearly killed his dog in a fit of anger. [R. at 13 (3-29), 560-62, 825]. It also noted that Mr. Johnston experienced visual hallucinations. [R. at 14 (3-29), 1077-80, 2989 (2987-89)]. The Board did not explain why the veteran’s attempt to kill himself does not constitute active suicidal ideation and evidence of self-harm, which falls under the 100 percent rating criteria. The Board also did not explain why Mr. Johnston nearly killing his dog in a fit of anger does not constitute a risk of hurting others. Nor did the Board explain why the veteran’s hallucinations do not warrant the assignment of a 100 rating. This symptomatology falls under the 100 percent rating criteria. *See Bankhead*, 29 Vet.App. at 21; 38 C.F.R. § 4.130, General Rating Formula for Mental Disorders. Absent explanation from the Board, understanding of the decision is hindered, and judicial review is frustrated. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Mittleider*, 11 Vet.App. at 182.

These errors prejudiced the veteran. *See Shinseki v. Sanders*, 556 U.S. 396, 407-10 (2009). Had the Board adequately evaluated Mr. Johnston’s symptomatology, it may have concluded that a rating in excess of 70 percent was warranted during the appeal period, or during a part of it. *See Fenderson v. West*, 12 Vet.App. 119 (1999) (discussing the applicability of staged ratings). For these reasons, the denial of a rating in excess of 70% should be vacated, and the claim remanded. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

- B. The Board's statement of reasons and bases for denying an effective date earlier than March 17, 2014, for the assignment of a 30 percent rating is inadequate, where the Board failed to discuss why an earlier effective date is not warranted in light of the May 2014 DBQ report showing that the veteran had more than seven non-incapacitating episodes of sinusitis over the past 12 months, or why the claim should not be remanded for further development.**

The BVA denied an effective date earlier than March 17, 2014, finding that the claims file is negative for any correspondence from the veteran between the December 2011 rating decision denying an increased rating and the March 17, 2014, request to reopen the claim. [R. at 25 (3-29)]. The Board noted that VA may assign an effective date within one year of the increased rating claim when it is factually ascertainable that the disability increased in severity, pursuant to 38 U.S.C. § 5110(b)(2) and 38 C.F.R. § 3.400(o)(2). *Id.*

The record contains a May 10, 2014, DBQ report, noting that the veteran had seven or more non-incapacitating episodes of sinusitis characterized by headaches, pain and purulent discharge in the past 12 months. [R. at 2701 (2700-05)]. The Board based its grant of the 30 percent rating on this examination report, and the symptomatology noted therein. [R. at 9 (3-29)]. The notation of these symptoms as present in the past 12 months indicates that Mr. Johnston's sinus condition increased in severity prior to the May 2014 DBQ report. While the specific date of symptom increase is not noted on the examination report, it is possible that it occurred on or after May 10, 2013, prior to the March 17, 2014, claim and within the one year period contemplated by 38 U.S.C. §

5110(b)(2) and 38 C.F.R. § 3.400(o)(2).

The Board failed to apply 38 U.S.C. § 5110(b)(2) and 38 C.F.R. § 3.400(o)(2) to the May 2014 DBQ report, and analyze whether it supports the grant of an effective date for the 30 percent rating earlier than March 17, 2014. Nor did the BVA discuss whether, in light of VA's duty to assist, the claim should be remanded for the agency of original jurisdiction to seek additional information regarding the onset of the non-incapacitating episodes prior to the May 2014 DBQ examination. *See Littke v. Derwinski*, 1 Vet.App. 90, 92 (1990) ("It is the obligation of the [VA] to assist a claimant in developing facts pertinent to his or her claim and to render a decision which grants him or her every benefit that can be supported in law..."). The Board did not discuss whether VA complied with its duty to assist at all. [R. at 3-29]. The failure to do so renders inadequate the Board's statement of reasons and bases for denying an effective date earlier than March 17, 2014, for the 30% percent rating. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. This prejudiced the veteran. *See Shinseki, supra*. Had the BVA considered the May 2014 DBQ examination report in light of 38 U.S.C. § 5110(b)(2) and 38 C.F.R. § 3.400(o)(2), it may have determined that an earlier effective date is warranted, or that the claim should be remanded for further development. Therefore, the denial should be vacated, and the claim remanded. *See Tucker*, 11 Vet.App. at 374.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that Court vacate

the denials of a rating in excess of 70 percent for depression and an effective date earlier than March 17, 2014, for the assignment of a 30 percent rating for sinusitis, and remand the claims.

Respectfully submitted,

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