



## ***Closed Evidentiary Record***

April 2023



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### Course Description:

This course teaches learners the definition of a closed evidentiary record and how to address evidence outside the closed record.

## The Bottom Line

Higher-level reviews (HLR) are unique in claims processing because they have a closed evidentiary record.

Decisionmakers must understand the elements of and how to process a claim with a closed evidentiary record



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### Instructor Notes:

#### **So, what is the bottom line with closed evidentiary records?**

Higher-level reviews (HLR) are unique in claims processing because they have a closed evidentiary record.

Decisionmakers must understand how to process a claim with a closed evidentiary record to process claims.

## Lesson Objectives

- Define the closed evidentiary record in an HLR
- Explain how to address evidence outside of the closed evidentiary record
- Analyze examples of closed evidentiary record



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### Instructor Notes:

At the end of this training, given the training and handouts, learners will be able to successfully complete knowledge checks and pass the end-of-course assessment through instruction of the following objectives:

- Define the closed evidentiary record in an HLR
- Explain how to address evidence outside of the closed evidentiary record
- Analyze examples of closed evidentiary record

## References

- [38 C.F.R. § 3.2601, Higher-level review](#)
- [M21-5, Chapter 5. Section 1.c., Restrictions of HLRs](#)
- [M21-5, 5.1.g., Defining Evidentiary Records for HLRs](#)
- [M21-5, 5.2.e., Addressing IU in an HLR](#)
- [M21-5, 5.4., Attempts to Introduce New Evidence](#)
- [Appeals Modernization Act \(AMA\) Higher-Level Reviews \(HLRs\)/Returns Frequently Asked Questions](#)



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### Instructor Notes:

The references for today's training include:

- [38 C.F.R. § 3.2601, Higher-level review.](#)
- [M21-5, 5.1.c., Restrictions of HLRs](#)
- [M21-5, 5.1.g., Defining Evidentiary Records for HLRs](#)
- [M21-5, 5.2.e., Addressing IU in an HLR](#)
- [M21-5, 5.4., Attempts to Introduce New Evidence](#)
- [Appeals Modernization Act \(AMA\) Higher-Level Reviews \(HLRs\)/Returns Frequently Asked Questions](#)



*Objective*

Define the Closed Evidentiary Record  
in an HLR



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Instructor Notes:

Let's jump-in to today's training by defining the closed evidentiary record in an HLR.

## What Is A Closed Evidentiary Record?

- Record that cannot include additional evidence
- Closes on date of last decision notice on the issue
- Can be issue-specific with multiple closed evidentiary record dates
  - Requires notification paragraph as defined in M21-5, 5.1.g.



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*Learning Objective: Define the closed evidentiary record in an HLR*

### Instructor Notes:

A closed evidentiary record is just that: it is a record of evidence that cannot include additional evidence after the date it closes.

In higher-level reviews, the evidentiary record closes as of the date of the last decision notice of the issue receiving review. If there are multiple previous decisions, the evidentiary record closes on the date of the most recent decision notice. This is most equitable to the Veteran.

For example, a Veteran claims service connection for tinnitus and is denied without an examination on November 6, 2022, due to no evidence of tinnitus in the record. Veteran then submitted a supplemental claim with private medical evidence of a diagnosis of tinnitus; the subsequently ordered VA medical evidence confirmed the diagnosis but the examiner provided a negative medical opinion. The supplemental claim was denied with notification letter dated April 11, 2023. The Veteran then files an HLR for tinnitus and writes the November 6, 2022, notification letter on the form. The

decisionmaker should consider the evidentiary record closed on April 11, 2023.

A claimant can use a single VA Form 20-0996, *Decision Review Request: Higher-Level Review*, to request review of issues from decisions that occurred on separate dates. When this occurs, the higher-level reviewer must ensure that the claimant is properly notified of the evidentiary record associated with the HLR decision because HLRs are, by definition, based on the same evidentiary record of the former decisions. Therefore, the HLR decision, when it stems from earlier decisions of different dates, must indicate which evidence pertains to which decisions.

Document the different evidentiary records by adding the following statement to the HLR decision *Introduction* section in VBMS-Rating (VBMS-R):

*Please note: The evidentiary record in a higher-level review is limited to the evidence of record as of the date the agency of original jurisdiction issued notice of the prior decision under review. The higher-level reviewer may not consider additional evidence. Therefore, VA will only consider evidence received by VA prior to or on [date] for [conditions]. Further, VA will only consider evidence received by VA prior to or on [date] for [conditions].*

**Note:** Clearly identify each evidentiary record for each issue only when the conditions under review stem from different decision dates. This requirement is not needed if all decisions under review arise from the same decision date.

## Date Evidentiary Record Closes

- Date of the decision notice of the issue receiving review
- Types of decision notices
  - New
  - Supplemental
  - Statement of the Case (SOC)
  - Supplemental Statement of the Case (SSOC)



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*Learning Objective: Define the closed evidentiary record in an HLR*

### Instructor Notes:

The date the evidentiary record closes is the date of the decision notice of the issue receiving review.

The decision notice can be a new or supplemental claim decision; for legacy appeals, the decision notice can be a Statement of the Case (SOC) or Supplemental Statement of the Case (SSOC).

If there are multiple decision notices, the last decision notice of record is the date the evidentiary record closes.



## Example of Determining Evidentiary Record Dates

Meredith Burns received a decision notice for denial of low back condition on 12/06/2021 and for denial of right knee condition on 01/22/2022. She files one HLR for both conditions.

When does the evidentiary record close for the HLR?



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*Learning Objective: Define the closed evidentiary record in an HLR*

### Instructor Notes:

Meredith Burns received a decision notice for denial of low back condition on 12/06/2021 and for denial of right knee condition on 01/22/2022. She files an HLR for both conditions.

When does the evidentiary record close for the HLR?

For the low back condition, the evidentiary record closed on 12/06/2021. For the right knee condition, the evidentiary record closed on 01/22/2022.

## Constructive Notice of VA Treatment Records

- Exists when the claimant relates the specific existence and location of records
- Mere existence of medical evidence does not constitute constructive notice
- Notice must be of record at the time of the prior decision



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*Learning Objective: Define the closed evidentiary record in an HLR*

### Instructor Notes:

Constructive notice of VA medical evidence exists when the claimant relates its specific existence and location. The fact that medical evidence exists somewhere in the VA system of records does not constitute constructive notice. The claimant or representative must provide information sufficient to locate such records.

To be part of the closed evidentiary record, constructive notice of VA medical evidence must be of record at the time of the prior decision. If the claimant and/or representative assert, as part of the higher-level review claim, the existence of VA treatment records which were not previously identified, those records cannot be considered by the higher-level reviewer. However, if these records were noted on a previous claim form or identified on a claim document as part of a prior claim, and not properly associated with the file at that time, then those records are part of the closed evidentiary record and can be considered by the higher-level reviewer.

## New Theories of Service Connection

- Can be addressed in an HLR
- Consider alternative theories of entitlement, raised after the decision under review



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*Learning Objective: Define the closed evidentiary record in an HLR*

### Instructor Notes:

New theories of entitlement to service connection can be addressed in an HLR decision. The HLR decisionmaker should consider alternative theories of entitlement, raised after the decision under review, during the HLR.

The Veteran and/or their representative is not attempting to introduce new evidence to be reviewed when they propose a theory of entitlement that was not expressly addressed by the previous decision. They are requesting that VA expressly address a theory that has already been denied, implicitly, by the decision under review, since a claim for service connection encompasses all potential theories whether claimed or unclaimed.

For example, the Veteran's initial claim was for migraines, which was properly denied on a direct basis. Veteran then filed an HLR for migraines and stated the migraines are due to service connected sleep apnea. Although this is a new theory of service connection, the decisionmaker should consider migraines on a secondary basis and if

necessary, return the contention for development as needed.

## Knowledge Check #1 Scenario

Rob Smith filed an original claim for hearing loss on 02/18/2021. The claim was properly denied because there was no evidence of the condition. Decision notice letter was dated 04/07/2021.

Mr. Smith filed a supplemental claim on 05/06/2021 with new medical records; however, the claim was denied with decision notice dated 07/20/2021.

Mr. Smith filed a claim for higher-level review on 09/16/2021



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*Learning Objective: Define the closed evidentiary record in an HLR*

### Instructor Notes:

**\*\*IMPORTANT:** Slide contains animations. Click to reveal the scenario, question and answer to students.\*\*

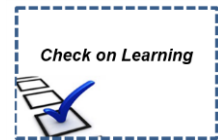
Rob Smith files an original claim for hearing loss on 02/18/2021. The claim was properly denied because there was no evidence of the condition. Decision notice letter was dated 04/07/2021.

Mr. Smith filed a supplemental claim on 05/06/2021 with new medical records; however, the claim was denied with decision notice dated 07/20/2021.

Mr. Smith filed a claim for higher-level review on 09/16/2021.

## Knowledge Check #1 Question and Answer

- **Question:** Given these facts, what date did the evidentiary record close for the higher-level review?
- **Answer:** The evidentiary record closed on 07/20/2021, the date of the last decision notice issued for the issue of hearing loss.



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*Learning Objective: Define the closed evidentiary record in an HLR*

### Instructor Notes:

**\*\*IMPORTANT:** Slide contains animations. Click to reveal the scenario, question and answer to students.\*\*

**Question:** Given these facts, what date did the evidentiary record close for the higher-level review?

**Answer:** The evidentiary record closed on 07/20/2021, the date of the last decision notice issued for the issue of hearing loss.



## *Objective*

Explain How to Address Evidence  
Outside the Closed Evidentiary Record



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### Instructor Notes:

Next we'll discuss how to address evidence received outside of the closed evidentiary record.

## Argument vs. Evidence

- Argument is not evidence
  - Evidence is any type of proof to establish a fact
  - Argument is an attempt to persuade
- Argument is permitted in closed evidentiary record



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*Learning Objective: Explain how to address evidence outside of closed record*

### Instructor Notes:

Argument is not evidence. The closed evidentiary record prohibits consideration of new evidence but allows consideration of new argument.

Evidence is every type of proof offered to establish a fact. In an HLR, the claimant or representative may not introduce new facts or new evidence, whether medical or lay.

Argument is the attempt to persuade someone to a particular view or belief using reason and facts. A claimant or representative may add, and the review may consider, a new argument that discusses ways VA may have interpreted the facts differently or applied the law to the facts differently than the evidentiary record has already established.



## New Evidence

- Requires notification to claimant or representative
  - Paragraph in Introduction section in VBMS-R
- Applicable even if evidence might warrant a grant



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*Learning Objective: Explain how to address evidence outside of closed record*

### Instructor Notes:

If a claimant submits evidence following the closure of the evidentiary record, the reviewer will notify the claimant or representative in the final decision document that VA received the additional evidence but could not consider it. This prohibition of considering new evidence extends even to when that evidence might otherwise warrant a grant of benefits.

Document any evidence received but not considered in the HLR by adding the following statement to the decision *Introduction* in VBMS-Rating (VBMS-R):

*Please note: The evidentiary record closed on the date of notice of our prior decision. VA received additional evidence, which was not part of that decision after the record closed. If you would like VA to consider this evidence, you may submit a supplemental claim at any time; however, VA must receive your application within one year of the date of notice of this decision to preserve your right to receive the maximum possible benefit.*

## Late-Flowing Mail

- Can be considered if the evidence is date stamped prior to the notification letter of the decision under review
- Example: Diabetes claim denied for no diagnosis
  - Decision notice dated 03/02/2022
  - PMR date stamped 03/01/2022, associated with file 03/08/2022
  - HLR filed 03/16/2022
  - HLR reviewer can consider the medical evidence since it was date stamped prior to the decision notice letter



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*Learning Objective: Explain how to address evidence outside of closed record*

### Instructor Notes:

Late-flowing mail can be considered if the evidence is date stamped prior to the notification letter of the decision under review.

For example, a Veteran's claim for diabetes was denied for no diagnosis. Decision notice was dated 03/02/2022. Veteran submitted private medical evidence that was date stamped 03/01/2022 but was not associated with the file until 03/08/2022. Veteran then filed an HLR on 03/16/2022. The HLR reviewer can consider the medical evidence since it was date stamped prior to the decision notice letter.

## Informal Conference

- Arguments regarding evidence that was of record at the time of the decision under review permitted
- New evidence not permitted in informal conference
- Inform the requester of the closed evidentiary record



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*Learning Objective: Explain how to address evidence outside of closed record*

### Instructor Notes:

During an informal conference, a requester or representative may wish to add to the evidentiary record or request review of evidence outside the scope of the HLR. If the requester or representative submits an argument regarding evidence that was of record at the time of the decision under review, then it can be considered by the reviewer.

However, if the submitted argument is considered lay evidence or introduces new facts, then it cannot be considered as part of the closed evidentiary record of an HLR. If this is the case, inform the requester of the closed evidentiary record.

If the requester or representative insists on submitting the evidence, the higher-level reviewer may accept it but will inform the requester or representative the reviewer cannot consider it. The requester or representative may submit a supplemental claim *after* receiving the HLR decision.

A claimant/representative may insist that VA retain the new evidence given it, even after VA has stated it will not consider that evidence in the HLR. VA employees may assist subsequent decisionmakers realize that the eFolder contains unconsidered evidence by ensuring the evidence is properly uploaded to the eFolder and editing the subject line of the relevant document(s) using the following format: *Evidence not considered in HLR of [date]*.

## Good Cause After Failure to Report

- Good cause after a decision is new and relevant evidence
- Willingness to report after decision is outside closed evidentiary record



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*Learning Objective: Define the closed evidentiary record in an HLR*

### Instructor Notes:

Good cause that is given by the claimant after a decision has been rendered and notification letter has been provided is considered new and relevant evidence. Willingness to report for an exam after the prior decision has been rendered is outside the closed evidentiary record. As such, if the claimant reports a willingness to report to an exam on VA Form 20-0996 or in an informal higher-level review conference, that willingness to report cannot be considered by the decisionmaker as it is new and relevant evidence.

For example, a Veteran claimed posttraumatic stress disorder (PTSD) and failed to report to the examination, leading to a denial. The Veteran then filed an HLR for the PTSD and during the informal conference, the Veteran stated he was out of town during the exam and was unable to attend but is now able to attend the exam. This is new and relevant evidence. The decision review officer is not able to consider the Veteran's statement as it is outside the closed evidentiary record.

## Individual Unemployability

- IU expressly claimed or reasonably raised by documentation or evidence within the scope of the closed record review
  - Consider IU as HLR contention
- IU expressly claimed or reasonably raised by documentation or evidence not within the closed record review
  - Do not consider IU as HLR contention



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*Learning Objective: Explain how to address evidence outside of closed record*

### Instructor Notes:

If IU was expressly claimed or reasonably raised by documentation or evidence within the scope of the closed record review, then consider IU as HLR contention and issue a decision. If IU cannot be properly decided based on the closed evidentiary record, then return the issue as a DTA error for development and adjudication.

If IU was expressly claimed or reasonably raised by documentation or evidence not within the closed record review, then do not consider IU as HLR contention because it falls outside the scope of the review. If the underlying condition(s) are all outside the scope of the HLR, then IU must be developed and decided under a separate EP in VBMS.

However, if all the underlying conditions are within the scope of the HLR, advise the claimant of the prohibition of considering new evidence outside the scope of the closed record.

If there are multiple underlying conditions with some, but not all, falling within the scope of the HLR, advise of the prohibition of considering new evidence. The issues outside the scope of the HLR should be adjudicated in accordance with M21-1, VIII.iv.3.B.

## Knowledge Check #2 Scenario

Rosa Marquez's claim for increase in depression was denied with decision notification letter dated 06/01/2021. She filed an HLR on 10/20/2021. With the HLR, she submitted a VA Form 21-4138, *Statement in Support of Claim*, discussing how the RVSR had a different interpretation of the exam, as well as treatment records from August to September 2021.



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*Learning Objective: Explain how to address evidence outside of closed record*

### Instructor Notes:

**\*\*IMPORTANT:** Slide contains animations. Click to reveal the scenario, question and answer to students.\*\*

Rosa Marquez's claim for increase in depression was denied with decision notification letter dated 06/01/2021. She filed an HLR on 10/20/21. With the HLR, she submitted a VA Form 21-4138, *Statement in Support of Claim*, discussing how the RVSR had a different interpretation of the exam, as well as treatment records from August to September 2021.



## Knowledge Check #2 Question and Answer

- **Question:** Is the new evidence paragraph required? If so, for which item is the paragraph applicable?
- **Answer:** The new evidence paragraph is required for the medical evidence dated August to September 2021. The paragraph is not needed for the VA 21-4138 as that is considered argument, not evidence.



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*Learning Objective: Explain how to address evidence outside of closed record*

### Instructor Notes:

**\*\*IMPORTANT:** Slide contains animations. Click to reveal the scenario, question and answer to students.\*\*

**Question:** Is the new evidence paragraph required? If so, for which item is the paragraph applicable?

**Answer:** The new evidence paragraph is required for the medical evidence dated August to September 2021. The paragraph is not needed for the VA 21-4138 as that is considered argument, not evidence.



*Objective*

Analyze Examples of Closed Evidentiary Record



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Instructor Notes:

Finally, let's review examples of closed evidentiary record.

## Example #1: Non-Rating

Jan Rosen's claim for dependency was denied because VA did not receive her child's birth certificate. She filed an HLR and submitted the birth certificate.

Can the decisionmaker consider the birth certificate in deciding the HLR?

If not, how does the decisionmaker notify the Veteran that VA cannot consider the birth certificate?



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*Learning Objective: Analyze examples of closed evidentiary record*

### Instructor Notes:

Jan Rosen's claim for dependency was denied because VA did not receive her child's birth certificate. She filed an HLR and submitted the birth certificate.

Can the decisionmaker consider the birth certificate in deciding the HLR?

If not, how does the decisionmaker notify the Veteran that VA cannot consider the birth certificate?

No, the decisionmaker cannot consider the birth certificate in deciding the HLR, even though the birth certificate might result in a grant of the benefit sought. The birth certificate was not of record when the previous decision was made, therefore, it is considered new evidence outside the closed evidentiary record.

The decisionmaker notifies the Veteran that VA cannot consider the birth certificate by including the closed evidentiary record paragraph in the decision.

## Example #2: Intervening Decision

Anwar Malik's original claim was denied with notification letter dated 03/11/2020. He filed a supplemental claim which was denied with notification letter dated 07/16/2020. He filed an HLR on which he listed the original denial notification as the date of the decision for review.

In this scenario, when did the evidentiary record close?



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*Learning Objective: Analyze examples of closed evidentiary record*

### Instructor Notes:

Anwar Malik's original claim was denied with notification letter dated 03/11/2020. He filed a supplemental claim which was denied with notification letter dated 07/16/2020. He filed an HLR on which he listed the original denial notification as the date of the decision.

In this scenario, when did the evidentiary record close?

Even though the Veteran wrote the date of the original denial notification as the date of the decision on VA Form 20-0996, the evidentiary record closed on 07/16/2020, which is the date of the last decision notice issued on the contention. The decisionmaker can review all evidence of record as of 07/16/2020.

## Example #3: Individual Unemployability

David Stewart submitted an HLR for the previous decision, which had confirmed and continued the 50 percent evaluation of PTSD, his only service-connected condition. With the HLR, he submitted VA Form 21-4138, in which he stated, for the first time, he can no longer work due to PTSD.

Can individual unemployability be considered part of the HLR?



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*Learning Objective: Analyze examples of closed evidentiary record*

### Instructor Notes:

David Stewart submitted an HLR for the previous decision, which had confirmed and continued the 50 percent evaluation of PTSD, his only service-connected condition. With the HLR, he submitted VA Form 21-4138, in which he stated, for the first time, he can no longer work due to PTSD.

Can individual unemployability be considered part of the HLR?

IU cannot be considered as part of the HLR because it falls outside the scope of the closed record review. Since the underlying condition is within the scope of the HLR, the decisionmaker must advise the claimant of the prohibition of considering new evidence outside the closed evidentiary record.

## Example #4: Constructive Notice

Pat Burns, with her original claim for service connection, did not note any treatment at any VA medical facility. After the claim was denied, she filed an HLR and in the informal conference, stated that she has received care at VAMC San Diego since 2019. Those records are not in the file.

Is the DRO allowed to consider the medical records from VAMC San Diego?



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*Learning Objective: Analyze examples of closed evidentiary record*

### Instructor Notes:

Pat Burns, with her original claim for service connection, did not note any treatment at any VA medical facility. After the claim was denied, she filed an HLR and in the informal conference, stated that she has received care at VAMC San Diego since 2019. Those records are not in the file.

Is the DRO allowed to consider the medical records from VAMC San Diego?

No, the DRO is not allowed to consider the medical records from VAMC San Diego. These records were not in the file at the time of the prior decision nor was there constructive notice of the existence of these records. The proper DRO actions in this scenario are addressed in a later objective.

## Knowledge Check #3

- **True or False?** Decisionmakers must inform claimants when new evidence is received in a closed evidentiary record, even if that evidence can result in a grant.
- **Answer:** True. Even if the new evidence results would result in a grant, the HLR reviewer cannot consider that evidence and must inform the claimant that the evidence cannot be considered.



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*Learning Objective: Analyze examples of closed evidentiary record*

### Instructor Notes:

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**True or False?** Decisionmakers must inform claimants when new evidence is received in a closed evidentiary record, even if that evidence can result in a grant.

**Answer:** True. Even if the new evidence results would result in a grant, the HLR reviewer cannot consider that evidence and must inform the claimant that the evidence cannot be considered.

## Course Summary

### Closed evidentiary record

- defining closed evidentiary record
- addressing evidence out of closed evidentiary record
- analyzing examples of closed evidentiary record



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### Instructor Notes:

As stated in the beginning of the training, the lesson objectives were to:

- define closed evidentiary record
- explain how to address evidence outside of closed evidentiary record
- analyze examples of closed evidentiary record

We discussed each of these objectives through the topics in each slide today.



# Questions?



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## Instructor Notes:

Are there any additional questions?

## Next Steps

- An assessment and satisfaction survey have been assigned to you in TMS
- You have unlimited attempts to complete the assessment and may answer one question incorrectly to achieve a passing score
- Be sure to complete the survey and assessment to receive credit for this training



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### Instructor Notes:

An assessment and satisfaction survey have been assigned to you in TMS. You have unlimited attempts to complete the assessment and may answer one question incorrectly to achieve a passing score. Completing both will allow you to receive credit for this training.